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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1984

JUNE 4 THROUGH JUNE 26, 1985

HENRY C. LIND
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

EDWIN MEESE III, Attorney General.
CHARLES FRIED, Acting Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
PENELOPE A. HAZELTON, Acting Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, LEWIS F. POWELL, JR., Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *it is ordered* that the Chief Justice be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 1982 edition.

Cases reported before page 1001 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 1001 *et seq.* are those in which orders were entered.

	Page
Acker *v.* Hawaii	1011
Ackerley Communications, Inc.; Multnomah County *v.*	1028
Afflerbach *v.* United States	1029
A. H. Robins Co. *v.* Theis	1008
Alabama; Baldwin *v.*	372
Alabama; Pennsylvania *v.*	1015
Alabama; Waldrop *v.*	1019
Albanese *v.* Illinois	1013
Albers; Whitley *v.*	1007
Alberti; Klevenhagen *v.*	1014
Albertini; United States *v.*	675
Alderson; Freight Checkers *v.*	1029
Alexander *v.* United States	1027
Allen *v.* Arkansas	1019
Almond *v.* Oklahoma	1010
Alpha Beta Co. *v.* Nahm	1004
Alpha Beta Co. *v.* Superior Court of Cal., Alameda County	1004
Alvarado *v.* United States	1012
Ambrose *v.* United States	1017
American Airlines, Inc.; Johnson *v.*	1027
American Hospital Assn.; Heckler *v.*	1016
Ampco Foods, Inc.; Bubar *v.*	1018
Anderson; Ganey *v.*	1019
Angelone; Thomas *v.*	1020
Arango *v.* Florida Bar	1003
Arduengo *v.* United States	1031
Arizona Distributing Co.; Buckingham Corp. *v.*	1027
Arkansas; Allen *v.*	1019
Arthur *v.* United States	1031
Aspen Highlands Skiing Corp.; Aspen Skiing Co. *v.*	585

	Page
Aspen Skiing Co. *v.* Aspen Highlands Skiing Corp.	585
Atkins, *In re*	1005
Atkins *v.* Parker	115
Atlantic Richfield Co. *v.* Doucet	1009
Attorney General of Tenn. *v.* Dole	1018
Attorney General of Wash. *v.* J–R Distributors, Inc.	491
Auburn Univ.; Mayfield *v.*	1029
Avco Financial Services, Inc. *v.* Davis	1012
Axelrod; Fahey *v.*	1013
Bahramian *v.* City Planning Comm'n of Cincinnati	1019
Baker *v.* Duckworth	1019
Baldwin *v.* Alabama	372
Bandemer; Davis *v.*	1006
Bank of America Nat. Tr. & Sav. Assn.; Timberlane Lumber Co. *v.*	1032
Barefoot; Ganey *v.*	1019
Batchelder; Mobil Oil Corp. *v.*	1023
Bateman Eichler, Hill Richards, Inc. *v.* Berner	299
Battisti; McMinn *v.*	1010
Baucom *v.* Cupp	1031
Beachboard *v.* Middle States Assn. of Colleges and Schools	1020
Becton *v.* United States	1018
Bell, *In re*	1025
Beloit Corp.; Valmet Oy *v.*	1009
Bender *v.* Williamsport Area School Dist.	1015
Benfield *v.* United States	1019
Bennett *v.* Slidell	1016
Bernalillo County Assessor; Hooper *v.*	612
Berner; Bateman Eichler, Hill Richards, Inc. *v.*	299
Blackburn; Celestine *v.*	1022
Black Grievance Committee; Independent Group Assn. *v.*	1008
Black Grievance Committee; Philadelphia Electric Co. *v.*	1008
Blauvelt *v.* United States	1017
Block; Parker *v.*	115
Blue Cross Hospital Service, Inc. of Missouri *v.* Frappier	1014
Board of Governors, FRS; Citicorp *v.*	1027
Board of Governors, FRS; Northeast Bancorp, Inc. *v.*	159
Bolger; Magee *v.*	1011
Bond, *In re*	1005
Booker *v.* Mississippi	1023
Borden, Inc.; Maxwell *v.*	1013
Bordenkircher; Franks *v.*	1030
Borman *v.* United States	1021
Bothke *v.* Racca	1033
Bowie *v.* Cady	1030

	Page
Brenner *v.* Universal-Resilite Co.	1028
Brewer; Mitchell *v.*	1010
Brock; Byanski *v.*	1021
Brockett *v.* Spokane Arcades, Inc.	491
Broer *v.* United States	1027
Brooks; Mark *v.*	1020
Brown *v.* Schweitzer	1033
Brunjes; Ganey *v.*	1020
Bubar *v.* Ampco Foods, Inc.	1018
Buck; Frank B. Hall & Co. *v.*	1009
Buckingham Corp. *v.* Arizona Distributing Co.	1027
Buckingham Corp. *v.* Odom Corp.	1027
Burbine; Moran *v.*	1006
Burlington Northern, Inc.; Schreiber *v.*	1
Byanski *v.* Brock	1021
Cable News Network, Inc. *v.* U. S. District Court	1017
Cady; Bowie *v.*	1030
Caldor, Inc.; Thornton's Estate *v.*	703
Caldwell *v.* Mississippi	320
California *v.* Ciraolo	1025
California *v.* Federal Communications Comm'n	1025
California; Ford *v.*	1030
Cannon; Hayes *v.*	1005
Carpenters *v.* National Labor Relations Bd.	1017
Cataldo *v.* Everett	1022
Celestine *v.* Blackburn	1022
Center for Nuclear Responsibility; Florida Power & Light Co. *v.*	1005
Center for Nuclear Responsibility; Nuclear Regulatory Comm'n *v.*	1005
Central Intelligence Agency; Neely *v.*	1013
Central States, S.E. & S.W. Areas Pens. Fund *v.* Central Transport	559
Central Transport; Central States, S.E. & S.W. Areas Pens. Fund *v.*	559
Cerri *v.* United States	1017
Certain *v.* Huntsville	1027
Charlotte; Moore *v.*	1021
Chartier, *In re*	1005
Cheng; GAF Corp. *v.*	1023
Chesapeake & Potomac Tel. Co.; Public Service Comm'n of Md. *v.*	1026
Chicago Bar Assn.; Matchett *v.*	1022
Chicago Housing Authority; Spreck *v.*	1020
Chief Judge, U. S. District Court; McMinn *v.*	1010
Chrysler Corp.; Ender *v.*	1009
Chula Vista; Tom Hudson & Associates, Inc. *v.*	1028
Cicero *v.* New York	1003
Cincinnati; Pembaur *v.*	1016

Page

Ciraolo; California *v.* 1025
Citicorp *v.* Board of Governors, FRS 1027
Cities Service Oil Co. *v.* Matzen 1023
City. See name of city.
City Planning Comm'n of Cincinnati; Bahramian *v.* 1019
Cleburne *v.* Cleburne Living Center, Inc. 1024
Cleburne Living Center, Inc.; Cleburne *v.* 1024
Coates *v.* United States 1030
Cobb *v.* United States 1028
Cochrane & Bresnahan *v.* Plaintiff Class Representatives 1008
Cody *v.* Dole 1018
Commissioner; Cull *v.* 1007
Commissioner of Internal Revenue. See Commissioner.
Committee on Prof. Ethics & Cond., Iowa Bar; Humphrey *v.* 1004
Committee on Prof. Ethics & Cond., Iowa Bar; Humphrey & Haas *v.* 1004
Committee on Prof. Standards *v.* Von Wiegen 1007
Commonwealth. See name of Commonwealth.
Connecticut *v.* Martin 1009
Connecticut Parole Bd.; Smith *v.* 1011,1030
Connolly *v.* Pension Benefit Guaranty Corporation 1006
Consolidated Gas Transmission Corp. *v.* FERC 1008
ContiCommodity Services, Inc.; Schor *v.* 1018
Conway; Leverson *v.* 1014
Cooper *v.* Riederer 1020
Coquillian *v.* Jones 1033
Cornelius *v.* Nutt 648
Costanzo *v.* United States 1017
Countiss; Seitu *v.* 1031
County. See name of county.
Cox *v.* Supreme Court of Fla. 1028
Crawford County *v.* Heiar 1027
Criswell; Western Air Lines, Inc. *v.* 400
Cull *v.* Commissioner 1007
Cuomo; Rebaldo *v.* 1008
Cupp; Baucom *v.* 1031
C. W. Transport, Inc.; Ehlenfeldt *v.* 1028
D.; Evans *v.* 1006
Daniels, *In re* 1024
Darville *v.* United States 1017
Davis; Avco Financial Services, Inc. *v.* 1012
Davis *v.* Bandemer 1006
De Nardo *v.* Williams 1025
Department of HUD; Walber *v.* 1033
Department of HUD; Walber Construction Co. *v.* 1033

Page
Department of Navy; Dunton *v.* ... 1021
Depree *v.* New York State Dept. of Labor ... 1031
DeVincent *v.* United States ... 1021,1031
Director of penal or correctional institution. See name or title of director.
District Court. See also U. S. District Court.
District Court of 2d Judicial District's Children's Court; Pino *v.* ... 1001
District Judge. See Chief Judge, U. S. District Court, and U. S. District Judge.
Dole; Tennessee *ex rel.* Cody *v.* ... 1018
Doney *v.* United States ... 1019
Doucet; Atlantic Richfield Co. *v.* ... 1009
Dow Chemical Co. *v.* United States ... 1007
Downs *v.* Kentucky ... 1011
Duckworth; Baker *v.* ... 1019
Dugger; Pickett *v.* ... 1020
Dunbar Stone Co. *v.* United States ... 1028
Dun & Bradstreet, Inc. *v.* Greenmoss Builders, Inc. ... 749
Dunton *v.* Department of Navy ... 1021
Earley *v.* United States ... 1010
Eastern Air Lines, Inc. *v.* Mahfoud ... 1015
Easton *v.* Oregon State Bar ... 1012
Eddleton *v.* United States ... 1008
Educational Testing Service; Johnson *v.* ... 1029
Ehlenfeldt *v.* C. W. Transport, Inc. ... 1028
Eikenberry *v.* J–R Distributors, Inc. ... 491
Ender *v.* Chrysler Corp. ... 1009
EEOC *v.* FLRA ... 1026
EEOC *v.* Mayor and City Council of Baltimore ... 353
Estate. See name of estate.
Evans *v.* Jeff D. ... 1006
Everett; Cataldo *v.* ... 1022
Exxon Corp. *v.* Hunt ... 1015
Fahey *v.* Axelrod ... 1013
Faul *v.* United States ... 1027
FCC; California *v.* ... 1025
FCC; Florida Public Service Comm'n *v.* ... 1026
FCC; Louisiana Public Service Comm'n *v.* ... 1025
FCC; Public Utilities Comm'n of Ohio *v.* ... 1025
FERC; Consolidated Gas Transmission Corp. *v.* ... 1008
FLRA; EEOC *v.* ... 1026
Feldman *v.* Jackson Memorial Hospital ... 1029
Fenton; Miller *v.* ... 1025
Ferro; New York *v.* ... 1007

	Page
First Alabama Bank, N. A.; Parsons Steel, Inc. *v.*	1026
Fleming *v.* Moore	1032
Florida *v.* Great American Bank of Broward County	1010
Florida; Koon *v.*	1031
Florida; Songer *v.*	1012
Florida Bar; Arango *v.*	1003
Florida Power & Light Co. *v.* Center for Nuclear Responsibility	1005
Florida Power & Light Co. *v.* Lorion	1005
Florida Public Service Comm'n *v.* FCC	1026
Flynn; Holbrook *v.*	1026
Ford *v.* California	1030
Ford *v.* United States	1029
Ford; Wynn *v.*	1020
Forsyth; Mitchell *v.*	511
Fort Belknap Housing Authority; R. J. Williams Co. *v.*	1016
Fowler *v.* Johnson	1031
Fox; Ganey *v.*	1019
Franco *v.* United States	1030
Frank B. Hall & Co. *v.* Buck	1009
Franks *v.* Bordenkircher	1030
Frappier; Blue Cross Hospital Service, Inc. of Missouri *v.*	1014
Freight Checkers *v.* Alderson	1029
Frye *v.* Sielaff	1010
Fulgham *v.* United States	1032
GAF Corp. *v.* Cheng	1023
Gailes *v.* Illinois	1011
Ganey *v.* Anderson	1019
Ganey *v.* Barefoot	1019
Ganey *v.* Brunjes	1020
Ganey *v.* Fox	1019
Ganey *v.* Woodard	1019
Gann *v.* Portland	1009
Garland Independent School Dist. *v.* Wilks	1009
Geiger *v.* United States	1031
General Motors Corp.; Johnson *v.*	1030
General Motors Corp. *v.* Mitchell	1028
Georgia; Ross *v.*	1022
Georgia; Waits *v.*	1008
Gilchrist; Romieh *v.*	1021
Gill; Lerner *v.*	1010
Gillock *v.* United States	1014
Ginter *v.* United States	1017
Gittleman; Mori *v.*	1028
Glass *v.* Louisiana	1033

	Page
Glinsman *v.* New York	1021
Goldberg *v.* United States	1009
Golden State Transit Corp. *v.* Los Angeles	1016
Goldman *v.* Weinberger	1016
Gonzales *v.* Texas	1009
Gonzalez; Prestress Engineering Corp. *v.*	1032
Gordon; McCoy *v.*	1030
Gordon *v.* National Aeronautics and Space Administration	1010
Gotcher *v.* Procunier	1011
Governor of Ala. *v.* Jaffree	38
Governor of Idaho *v.* Jeff D.	1006
Governor of N. Y.; Rebaldo *v.*	1008
Govine; Williams *v.*	1013
Grand Lodge of Freemasonry; Williams *v.*	1023
Granger; Texas *v.*	1012
Gravely *v.* Holland	1030
Great American Bank of Broward County; Florida *v.*	1010
Great Western Sugar Co.; K N Energy, Inc. *v.*	1022
Greenfield; Wainwright *v.*	1006
Greenmoss Builders, Inc.; Dun & Bradstreet, Inc. *v.*	749
Hall & Co. *v.* Buck	1009
Halliwell *v.* Strickland	1011
Harper *v.* Washington	1011
Harter *v.* Schultz	1013
Hawaii; Acker *v.*	1011
Hayes *v.* Cannon	1005
Heckler *v.* American Hospital Assn.	1016
Heckler; Kilpatrick *v.*	1004
Heckler; Massachusetts *v.*	1017
Heckler *v.* Roy	1016
Heckler; St. Mary's Hospital Medical Center *v.*	1028
Heiar; Crawford County *v.*	1027
Henderson *v.* Wilson	1026
Hendricks *v.* United States	1008
Hepps; Philadelphia Newspapers, Inc. *v.*	1025
Herring *v.* United States	1010
Hiljer *v.* Walters	1029
Hill *v.* Mississippi	1010
Hill; Superintendent, Mass. Correctional Inst. at Walpole *v.*	445
Hobson *v.* United States	1017
Holbrook *v.* Flynn	1026
Holland, *In re*	1006
Holland; Gravely *v.*	1030
Holland; Meadows *v.*	1020

	Page
Hooper *v.* Bernalillo County Assessor	612
House of Sofas; Luna *v.*	1033
Howard, *In re*	1024
Howard *v.* United States	1030
Hudson; Teachers *v.*	1007
Hudson & Associates, Inc. *v.* Chula Vista	1028
Huene *v.* United States	1027
Humphrey *v.* Committee on Prof. Ethics & Cond., Iowa Bar	1004
Humphrey & Haas *v.* Committee on Prof. Ethics & Cond., Iowa Bar	1004
Hunt; Exxon Corp. *v.*	1015
Hunt *v.* United States	1018
Hunter, *In re*	1022
Huntsville; Certain *v.*	1027
Hurd, *In re*	1024
Hutchings *v.* United States	1031
Hux *v.* Murphy	1022
Iacopelli *v.* United States	1012
Ilchert; Prentice *v.*	1019
Illinois; Albanese *v.*	1013
Illinois; Gailes *v.*	1011
Illinois; Key *v.*	1011
Illinois; Lancaster *v.*	1028
Illinois; Lovelace *v.*	1031
Independent Group Assn. *v.* Black Grievance Committee	1008
Indiana *v.* Minnick	1032
Indiana; Spikes *v.*	1013
In re. See name of party.	
International. For labor union, see name of trade.	
Interqual, Inc.; Marrese *v.*	1027
Interstate Commerce Comm'n *v.* Texas	1032
Interstate Commerce Comm'n *v.* Tri-State Motor Transit Co.	1032
Interstate Commerce Comm'n; Tri-State Motor Transit Co. *v.*	1027
Ivery *v.* Kent State Univ.	1031
Jackson; Magnolia Brokerage Co. *v.*	1008
Jackson *v.* United States	1010
Jackson Memorial Hospital; Feldman *v.*	1029
Jacob, *In re*	1005
Jaffree; Smith *v.*	38
Jaffree; Wallace *v.*	38
Jaworski; Pritchard-Keang Nam Corp. *v.*	1022
Jean *v.* Nelson	846
Jeff D.; Evans *v.*	1006
Jenkins *v.* Ohio	1032
Jensen *v.* Quaring	478

Page
Jewell *v.* United States 1021
Johnson *v.* American Airlines, Inc. 1027
Johnson *v.* Educational Testing Service 1029
Johnson; Fowler *v.* 1031
Johnson *v.* General Motors Corp. 1030
Johnson *v.* Maryland 1018
Johnson *v.* Mayor and City Council of Baltimore 353
Jokinen, *In re* 1015
Jones; Coquillian *v.* 1033
Jones; Keno *v.* 1014
Jones; Lundy *v.* 1011
Jones *v.* Reagan 1029
Jones *v.* Virginia 1012
J–R Distributors, Inc.; Eikenberry *v.* 491
Kahl *v.* United States 1027
Karapinka *v.* Union Carbide Corp. 1008
Kelly *v.* United States 1029
Kemp *v.* U. S. Postal Service 1011
Kennedy, *In re* 1005
Keno *v.* Jones 1014
Kent State Univ.; Ivery *v.* 1031
Kentucky; Downs *v.* 1011
Key *v.* Illinois 1011
Kilpatrick *v.* Heckler 1004
Klevenhagen *v.* Alberti 1014
Klimek *v.* Tedesco Limited Partnership 1009
K N Energy, Inc. *v.* Great Western Sugar Co. 1022
Koller; Richardson-Merrell Inc. *v.* 424
Koon *v.* Florida 1031
Labor Union. See name of trade.
Laffey *v.* Northwest Airlines, Inc. 1021
Lampitt *v.* United States 1029
Lancaster *v.* Illinois 1028
LaPlaca *v.* United States 1007
Larson *v.* Mulcrone 1030
Lee *v.* United States 1030
Lehigh County Court of Common Pleas; Williams *v.* 1019
Lennon; Reickenbacker *v.* 1019
Lensing; Williams *v.* 1030
Lerner *v.* Gill 1010
Leverson *v.* Conway 1014
Likakur *v.* Washington 1011
Lill *v.* United States 1016
Local. For labor union, see name of trade.

	Page
Lorion; Florida Power & Light Co. *v.*	1005
Lorion; Nuclear Regulatory Comm'n *v.*	1005
Los Angeles; Golden State Transit Corp. *v.*	1016
Louisiana; Glass *v.*	1033
Louisiana; Nelson *v.*	1013
Louisiana Public Service Comm'n *v.* FCC	1025
Lovelace *v.* Illinois	1031
Lowe *v.* Securities and Exchange Comm'n	181
Lucas *v.* South Carolina	1012
Luna *v.* House of Sofas	1033
Lundy *v.* Jones	1011
MacLeod *v.* Santa Clara County	1009
Macon; Maryland *v.*	463
Magee *v.* Bolger	1011
Maggio; Moore *v.*	1032
Maggio; Tennart *v.*	1031
Magnolia Brokerage Co. *v.* Jackson	1008
Mahfoud; Eastern Air Lines, Inc. *v.*	1015
Maine; United States *v.*	1015
Maker *v.* United States	1017
Manna *v.* United States	1012
Manske; Smith *v.*	1020
Manzanares *v.* New Mexico	1013
March *v.* March	1004
Mark *v.* Brooks	1020
Marlow *v.* Tully	1010
Marrese *v.* Interqual, Inc.	1027
Martin; Connecticut *v.*	1009
Martin; Shahryar *v.*	1031
Martin *v.* United States	1029
Martin *v.* Woodard	1020
Maryland; Johnson *v.*	1018
Maryland *v.* Macon	463
Maryland; Thomas *v.*	1011
Maschner; Weser *v.*	1030
Mason *v.* Sielaff	1033
Massachusetts *v.* Heckler	1017
Masters, Mates & Pilots; Wallace *v.*	1011
Matchett *v.* Chicago Bar Assn.	1022
Matlack *v.* Wyoming	1030
Matsushita Electric Industrial Co. *v.* Zenith Radio Corp.	1015,1024
Matthews *v.* Ohio	1020
Matzen; Cities Service Oil Co. *v.*	1023
Maurer *v.* Ohio	1012

Page
Maxwell *v.* Borden, Inc. 1013
Maxwell *v.* Pennsylvania 1033
Mayfield *v.* Auburn Univ. 1029
Mayor and City Council of Baltimore; EEOC *v.* 353
Mayor and City Council of Baltimore; Johnson *v.* 353
McCall; Span *v.* 1020
McClelland *v.* United States 1010
McCotter; Milton *v.* 1033
McCoy *v.* Gordon 1030
McCullough; Texas *v.* 1007
McDonald *v.* Smith 479
McMinn *v.* Battisti 1010
Meadows *v.* Holland 1020
Mechanik *v.* United States 1016
Mechanik; United States *v.* 1016
Melton *v.* United States 1012
Middle States Assn. of Colleges and Schools; Beachboard *v.* 1020
Midlantic Nat. Bank *v.* N. J. Dept. of Environmental Protection . 1024
Miller *v.* Fenton 1025
Milton *v.* McCotter 1033
Minnick; Indiana *v.* 1032
Mississippi; Booker *v.* 1023
Mississippi; Caldwell *v.* 320
Mississippi; Hill *v.* 1010
Missouri *v.* Settle 1007
Mitchell *v.* Brewer 1010
Mitchell *v.* Forsyth 511
Mitchell; General Motors Corp. *v.* 1028
Mobil Oil Corp. *v.* Batchelder 1023
Moeller *v.* Solem 1020
Montgomery County Dept. of Social Services; Romieh *v.* 1021
Moore *v.* Charlotte 1021
Moore; Fleming *v.* 1032
Moore *v.* Maggio 1032
Moran *v.* Burbine 1006
Mori *v.* Gittleman 1028
Mountain States Telephone & Telegraph Co. *v.* Pueblo of Santa Ana 237
Mount Royal Marine Repairs; Pakistan National Shipping Corp. *v.* 1018
Mourad *v.* United States 1007
Mulcrone; Larson *v.* 1030
Multnomah County *v.* Ackerley Communications, Inc. 1028
Murphy; Hux *v.* 1022
Murphy; Smith *v.* 1008
Muskego; Vandenplas *v.* 1018

	Page
Nahm; Alpha Beta Co. *v.*	1004
National Aeronautics and Space Administration; Gordon *v.*	1010
NAACP *v.* N. A. A. C. P. Legal Defense & Educational Fund, Inc.	1021
N. A. A. C. P. Legal Defense & Educational Fund, Inc.; NAACP *v.*	1021
National Bank of Commerce; United States *v.*	713
NLRB; Carpenters *v.*	1017
NLRB; Volunteers of America—Minnesota-Bar None Boys Ranch *v.*	1028
Neely *v.* Central Intelligence Agency	1013
Nelson; Jean *v.*	846
Nelson *v.* Louisiana	1013
New Jersey Dept. of Env. Protection; Midlantic Nat. Bank *v.*	1024
New Jersey Dept. of Env. Protection; O'Neill *v.*	1024
New Mexico; Manzanares *v.*	1013
New York; Cicero *v.*	1003
New York *v.* Ferro	1007
New York; Glinsman *v.*	1021
New York; O'Neill *v.*	1024
New York State Dept. of Labor; Depree *v.*	1031
Nichelson *v.* Quaker Oats Co.	1004
North Carolina Dept. of Revenue; Village Publishing Corp. *v.*	1001
North Carolina Mutual Life Ins. Co. of Durham; Wilson *v.*	1018
Northeast Bancorp, Inc. *v.* Board of Governors, FRS	159
Northern Illinois Gas Co. *v.* United States	1027
Northwest Airlines, Inc.; Laffey *v.*	1021
Northwest Wholesale Stationers *v.* Pacific Stationery & Printing	284
Nuclear Regulatory Comm'n *v.* Center for Nuclear Responsibility	1005
Nuclear Regulatory Comm'n *v.* Lorion	1005
Nutt; Cornelius *v.*	648
Odom Corp.; Buckingham Corp. *v.*	1027
Ohio; Jenkins *v.*	1032
Ohio; Matthews *v.*	1020
Ohio; Maurer *v.*	1012
Oklahoma; Almond *v.*	1010
Oklahoma; Stout *v.*	1022
Olson; Slingerland *v.*	1023
O'Neill *v.* New Jersey Dept. of Environmental Protection	1024
O'Neill *v.* New York	1024
Oregon State Bar; Easton *v.*	1012
Pacific Gas & Electric Co. *v.* Public Utilities Comm'n of Cal.	1015
Pacific Stationery & Printing; Northwest Wholesale Stationers *v.*	284
Pakistan National Shipping Corp. *v.* Mount Royal Marine Repairs	1018
Palmer *v.* Tucker	1033
Pan American World Airways, Inc. *v.* Puchert	1001
Parker; Atkins *v.*	115

Page

Parker *v.* Block 115
Parsons Steel, Inc. *v.* First Alabama Bank, N. A. 1026
Pembaur *v.* Cincinnati 1016
Pennsylvania *v.* Alabama 1015
Pennsylvania; Maxwell *v.* 1033
Pension Benefit Guaranty Corporation; Connolly *v.* 1006
Pension Benefit Guaranty Corporation; Woodward Sand Co. *v.* ... 1006
Peppard *v.* United States 1031
Philadelphia Electric Co. *v.* Black Grievance Committee 1008
Philadelphia Newspapers, Inc. *v.* Hepps 1025
Phillips Petroleum Co. *v.* Shutts 797
Pickett *v.* Dugger 1020
Pino *v.* District Court of 2d Judicial District's Children's Court ... 1001
Plaintiff Class Representatives; Cochrane & Bresnahan *v.* 1008
Playtime Theatres, Inc.; Renton *v.* 1006
Portland; Gann *v.* 1009
Postmaster General; Magee *v.* 1011
Pouncey; Twillie *v.* 1009
Prairie View *v.* Thomas 1017
Prentice *v.* Ilchert 1019
Prenzler *v.* Prenzler 1004
President of United States; Jones *v.* 1029
Pressmen; San Francisco Newspaper Agency *v.* 1009
Pressmen; San Francisco Newspaper Printing Co. *v.* 1009
Prestress Engineering Corp. *v.* Gonzalez 1032
Pritchard-Keang Nam Corp. *v.* Jaworski 1022
Procunier; Gotcher *v.* 1011
Procunier; Williams *v.* 1018
Public Service Comm'n of Md. *v.* Chesapeake & Potomac Tel. Co. 1026
Public Utilities Comm'n of Cal.; Pacific Gas & Electric Co. *v.* 1015
Public Utilities Comm'n of Ohio *v.* FCC 1025
Puchert; Pan American World Airways, Inc. *v.* 1001
Pueblo of Santa Ana; Mountain States Telephone & Telegraph Co. *v.* 237
Pulley; Wilson *v.* 1011
Quaker Oats Co.; Nichelson *v.* 1004
Quaring; Jensen *v.* 478
Racca; Bothke *v.* 1033
Reagan; Jones *v.* 1029
Rebaldo *v.* Cuomo 1008
Reickenbacker *v.* Lennon 1019
Renton *v.* Playtime Theatres, Inc. 1006
Richardson-Merrell Inc. *v.* Koller 424
Riederer; Cooper *v.* 1020
R. J. Williams Co. *v.* Fort Belknap Housing Authority 1016

	Page
Robins Co. *v.* Theis	1008
Robinson; Sanders *v.*	1014
Robinson *v.* United States	1023
Romieh *v.* Gilchrist	1021
Romieh *v.* Montgomery County Dept. of Social Services	1021
Ross *v.* Georgia	1022
Roth, *In re*	1024
Roy; Heckler *v.*	1016
Rusniaczek *v.* United Air Lines	1019
Russell *v.* United States	1017
Saintil *v.* United States	1012
St. Mary's Hospital Medical Center *v.* Heckler	1028
St. Vincent Hospital; Salsbury *v.*	1008
Salsbury *v.* St. Vincent Hospital	1008
Sanders *v.* Robinson	1014
San Francisco Newspaper Agency *v.* Pressmen	1009
San Francisco Newspaper Printing Co. *v.* Pressmen	1009
Santa Clara County; MacLeod *v.*	1009
Santa Fe Pacific R. Co.; Spurlock *v.*	1032
Schor *v.* ContiCommodity Services, Inc.	1018
Schreiber *v.* Burlington Northern, Inc.	1
Schultz; Harter *v.*	1013
Schweitzer; Brown *v.*	1033
Secretary of Agriculture; Parker *v.*	115
Secretary of Defense; Goldman *v.*	1016
Secretary of HHS *v.* American Hospital Assn.	1016
Secretary of HHS; Kilpatrick *v.*	1004
Secretary of HHS; Massachusetts *v.*	1017
Secretary of HHS *v.* Roy	1016
Secretary of HHS; St. Mary's Hospital Medical Center *v.*	1028
Secretary of Interior; Truckee-Carson Irrigation Dist. *v.*	1007
Secretary of Labor; Byanski *v.*	1021
Secretary of State; Harter *v.*	1013
Secretary of Transportation; Tennessee *ex rel.* Cody *v.*	1018
Secretary of Treasury; Sorenson *v.*	1016
Securities and Exchange Comm'n; Lowe *v.*	181
Seitu *v.* Countiss	1031
Settle; Missouri *v.*	1007
Shahryar *v.* Martin	1031
Shelton *v.* United States	1029
Shipp *v.* United States	1019
Short, *In re*	1024
Shutts; Phillips Petroleum Co. *v.*	797
Sielaff; Frye *v.*	1010

Page
Sielaff; Mason *v.* 1033
Sixta *v.* United States 1029
Slidell; Bennett *v.* 1016
Slingerland *v.* Olson 1023
Smith, *In re* 1014
Smith *v.* Connecticut Parole Bd. 1011,1030
Smith *v.* Jaffree 38
Smith *v.* Manske 1020
Smith; McDonald *v.* 479
Smith *v.* Murphy 1008
Snyder, *In re* 634
Solem; Moeller *v.* 1020
Songer *v.* Florida 1012
Songer; Wainwright *v.* 1012
Sorenson *v.* Secretary of Treasury 1016
South Carolina; Lucas *v.* 1012
Span *v.* McCall 1020
Spellman; Young *v.* 1031
Spiess *v.* United States 1010
Spikes *v.* Indiana 1013
Spokane Arcades, Inc.; Brockett *v.* 491
Spreck *v.* Chicago Housing Authority 1020
Spurlock *v.* Santa Fe Pacific R. Co. 1032
Stanley *v.* Texas 1018
State. See name of State.
State Oil & Gas Bd. of Miss.; Transcontinental Gas Pipe Line *v.* .. 1025
Stout *v.* Oklahoma 1022
Strickland; Halliwell *v.* 1011
Superintendent, Mass. Correctional Inst. at Walpole *v.* Hill 445
Superintendent of penal or correctional institution. See also name or title of superintendent.
Superior Court of Cal., Alameda County; Alpha Beta Co. *v.* 1004
Supreme Court of Fla.; Cox *v.* 1028
Teachers *v.* Hudson 1007
Tedesco Limited Partnership; Klimek *v.* 1009
Tennart *v.* Maggio 1031
Tennessee; Wilson *v.* 1030
Tennessee *ex rel.* Cody *v.* Dole 1018
Terrell *v.* United States 1029
Texas; Gonzales *v.* 1009
Texas *v.* Granger 1012
Texas; Interstate Commerce Comm'n *v.* 1032
Texas *v.* McCullough 1007
Texas; Stanley *v.* 1018

	Page
Thanh, *In re*	1006
Theis; A. H. Robins Co. *v.*	1008
Thibault *v.* Weiss	1013
Thomas *v.* Angelone	1020
Thomas *v.* Maryland	1011
Thomas; Prairie View *v.*	1017
Thornton's Estate *v.* Caldor, Inc.	703
Timberlane Lumber Co. *v.* Bank of America Nat. Trust & Sav. Assn.	1032
Tom Hudson & Associates, Inc. *v.* Chula Vista	1028
Transcontinental Gas Pipe Line Corp. *v.* State Oil & Gas Bd.	1025
Tri-State Motor Transit Co. *v.* Interstate Commerce Comm'n	1027
Tri-State Motor Transit Co.; Interstate Commerce Comm'n *v.*	1032
Truckee-Carson Irrigation Dist. *v.* Secretary of Interior	1007
Tucker; Palmer *v.*	1033
Tully; Marlow *v.*	1010
Twillie *v.* Pouncey	1009
Udey *v.* United States	1017
Union. For labor union, see name of trade.	
Union Carbide Corp.; Karapinka *v.*	1008
United Air Lines; Rusniaczek *v.*	1019
United States. See name of other party.	
United States Attorney; Ward *v.*	1021
U. S. District Court; Cable News Network, Inc. *v.*	1017
U. S. District Judge; A. H. Robins Co. *v.*	1008
U. S. Postal Service; Kemp *v.*	1011
Universal-Resilite Co.; Brenner *v.*	1028
Valmet Oy *v.* Beloit Corp.	1009
Vandenplas *v.* Muskego	1018
Vermont; Williams *v.*	14
Village Publishing Corp. *v.* North Carolina Dept. of Revenue	1001
Villanueva *v.* United States	1017
Virginia; Jones *v.*	1012
Vitousek; Yee *v.*	1009
Volunteers of America—Minnesota-Bar None Boys Ranch *v.* NLRB	1028
Von Wiegen; Committee on Professional Standards *v.*	1007
Wainwright *v.* Greenfield	1006
Wainwright *v.* Songer	1012
Waits *v.* Georgia	1008
Walber *v.* Department of HUD	1033
Walber Construction Co. *v.* Department of HUD	1033
Waldon, *In re*	1025
Waldrop *v.* Alabama	1019
Waldrop *v.* United States	1021
Wallace *v.* Jaffree	38

Page
Wallace *v.* Masters, Mates & Pilots 1011
Walters, *In re* 1005
Walters; Hiljer *v.* 1029
Ward *v.* United States 1017
Ward *v.* United States Attorney 1021
Warden. See name of warden.
Washington; Harper *v.* 1011
Washington; Likakur *v.* 1011
Weinberger; Goldman *v.* 1016
Weiss; Thibault *v.* 1013
Weser *v.* Maschner 1030
West *v.* United States 1013
Western Air Lines, Inc. *v.* Criswell 400
Whitley *v.* Albers 1007
Wilks; Garland Independent School Dist. *v.* 1009
Williams; De Nardo *v.* 1025
Williams *v.* Govine 1013
Williams *v.* Grand Lodge of Freemasonry 1023
Williams *v.* Lehigh County Court of Common Pleas 1019
Williams *v.* Lensing 1030
Williams *v.* Procunier 1018
Williams *v.* United States 1012,1019
Williams *v.* Vermont 14
Williams Co. *v.* Fort Belknap Housing Authority 1016
Williamsport Area School Dist.; Bender *v.* 1015
Wilson; Henderson *v.* 1026
Wilson *v.* North Carolina Mutual Life Ins. Co. of Durham 1018
Wilson *v.* Pulley 1011
Wilson *v.* Tennessee 1030
Woodard; Ganey *v.* 1019
Woodard; Martin *v.* 1020
Woodward Sand Co. *v.* Pension Benefit Guaranty Corporation ... 1006
Wynn *v.* Ford 1020
Wyoming; Matlack *v.* 1030
Yee *v.* Vitousek 1009
Young *v.* Spellman 1031
Zenith Radio Corp.; Matsushita Electric Industrial Co. *v.* 1015,1024

TABLE OF CASES CITED

Page

Abbott Laboratories v. Gardner, 387 U.S. 136 864
Abington School Dist. v. Schempp, 374 U.S. 203 49, 53, 56, 58, 60, 61, 71, 72, 74, 80, 84, 86, 90, 99, 108
Abney v. United States, 431 U.S. 651 431, 525, 527, 528, 537, 546, 547, 550
Abood v. Detroit Bd. of Ed., 431 U.S. 209 777, 787
A. C. Frost & Co. v. Coeur d'Alene Mines Corp., 312 U.S. 38 310, 311
Adams v. Gunnell, 729 F. 2d 362 459
Adams Theatre Co. v. Keenan, 12 N. J. 267 498
Adderly v. Florida, 385 U.S. 39 488, 490
Aikens v. Lash, 514 F. 2d 55 459
Ake v. Oklahoma, 470 U.S. 68 324
Alaska Pacific Fisheries v. United States, 248 U.S. 78 277
Alaska Packers Assn. v. Industrial Accident Comm'n, 294 U.S. 532 836
Allen v. Alleghany Co., 196 U.S. 458 834
Allen v. Louisiana, 103 U.S. 80 502
Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 22, 34, 35
Allstate Ins. Co. v. Hague, 449 U.S. 302 818–820, 822–824, 836, 837, 842–844
Alonzo v. United States, 249 F. 2d 189 281, 282
American Federation of Labor v. Swing, 312 U.S. 321 787
American Motor Specialties Co. v. FTC, 278 F. 2d 225 293
Antwerp Diamond Exchange, Inc. v. Better Business Bureau, 130 Ariz. 523 753

Page

Aquilino v. United States, 363 U.S. 509 722–724, 742, 745, 746
Arizona v. Maricopa County Medical Society, 457 U.S. 332 289
Arizona v. Rumsey, 467 U.S. 203 332
Arizona v. San Carlos Apache Tribe, 463 U.S. 545 261
Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 804
Arnett v. Kennedy, 416 U.S. 134 669
Arritt v. Grisell, 567 F. 2d 1267 359, 416, 421
Ashland Oil & Refining Co. v. Staats, Inc., 271 F. Supp. 571 827
Ashwander v. TVA, 297 U.S. 288 123, 190, 212, 453, 854, 859
Assessment of Taxes Against Village Pub. Corp., In re, 312 N. C. 211 1002
Associated Press v. United States, 326 U.S. 1 290, 294, 599, 783, 791
Atkins v. Parker, 472 U.S. 115 190
August v. Bronstein, 369 F. Supp. 190 621, 622
Augustin v. Sava, 735 F. 2d 32 868
Austin v. New Hampshire, 420 U.S. 656 36
Austin's Adm'x v. Winston's Ex'x, 11 Va. 33 306
Babb v. Schmidt, 496 F. 2d 957 719, 725, 744
Babbitt v. Farm Workers, 442 U.S. 289 510
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 28

Page

Bachowski v. Usery, 545 F. 2d 363 440
Baird v. State, 12 Ark. App. 71 467
Baker v. Carr, 369 U.S. 186 804
Baldwin, Ex parte, 456 So. 2d 129 391, 395
Baldwin v. Hale, 1 Wall. 223 148
Bank of Nevada v. United States, 251 F. 2d 820 719, 722, 725, 744
Banque de Rive, S.A. v. Highland Beach Development Corp., 758 F. 2d 559 432
Bantam Books, Inc. v. Sullivan, 372 U.S. 58 476
Barclay v. Florida, 463 U.S. 939 348, 350, 351
Barefoot v. Estelle, 463 U.S. 880 329, 399
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 577
Barry v. Barchi, 443 U.S. 55 178
Bates v. State Bar of Ariz., 433 U.S. 350 235, 792
Baxter v. Palmigiano, 425 U.S. 308 455
Beard v. State, 19 Ala. App. 102 334
Beck v. Alabama, 447 U.S. 625 378, 386–389, 394, 395, 397
Beck v. McElrath, 548 F. Supp. 1161 71
Beck v. State, 365 So. 2d 985 383
Beck v. State, 396 So. 2d 645 376, 379, 385, 389
Bell v. State, 360 So. 2d 1206 328
Bellotti v. Baird, 428 U.S. 132 510
Berger v. New York, 388 U.S. 41 532
Berkey v. Third Avenue R. Co., 244 N. Y. 84 107
Bever v. Gilbertson, 724 F. 2d 1083 519
Bigelow v. Virginia, 421 U.S. 809 788
Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 484, 488

Page

Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 130
Bishop v. Wood, 426 U.S. 341 500
Bithoney, In re, 486 F. 2d 319 644
Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 523, 542
Black v. Black, 199 Ark. 609 741, 742
Blacklock v. United States, 208 U.S. 75 739
Blackwell v. State, 70 So. 731 334
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 309, 310
Board of Ed. v. Allen, 392 U.S. 236 66, 82, 108–110, 710
Board of Ed. v. Minor, 23 Ohio St. 211 49
Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238 461
Board of Regents v. Roth, 408 U.S. 564 148
Board of School Comm'rs of Mobile County v. Jaffree, 466 U.S. 926 47
Bolger v. Young Drug Products Corp., 463 U.S. 60 792, 795
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 76, 210, 776, 777, 787
Boston Edison Co. v. Board of Selectmen of Concord, 355 Mass. 79 451
Boston Edison Co. v. Boston Redevelopment Authority, 374 Mass. 37 452
Boutte v. Chevron Oil Co., 316 F. Supp. 524 828
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 865
Boyd v. United States, 116 U.S. 616 477
Bradley v. Fisher, 13 Wall. 335 522
Brady v. Maryland, 373 U.S. 83 351
Brandon v. Holt, 469 U.S. 464 556

Page

Branzburg v. Hayes, 408 U.S. 665 225, 773, 783
Braunfeld v. Brown, 366 U.S. 599 82
Bridges v. California, 314 U.S. 252 783
Brinegar v. United States, 338 U.S. 160 477
Briscoe v. LaHue, 460 U.S. 325 520, 521
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 290, 294–296, 298, 598
Broadrick v. Oklahoma, 413 U.S. 601 495, 503, 504, 509
Brown v. Board of Ed., 347 U.S. 483 80
Brown v. Hartlage, 456 U.S. 45 758
Brown v. Ohio, 432 U.S. 161 709
Brown-Bey v. United States, 720 F. 2d 467 459
Bruno v. Department of Consumer Protection, 190 Conn. 14 709
Bryan v. Itasca County, 426 U.S. 373 261, 276
Buckley v. Valeo, 424 U.S. 1 230, 502, 507, 759, 773
Buffalo Forge Co. v. Ogden Corp., 717 F. 2d 757 5
Bull v. United States, 295 U.S. 247 733–735
Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89 650, 652, 662, 663, 671
Burkhart v. Saxbe, 596 F. Supp. 96 522
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156 865
Burr, Ex parte, 9 Wheat. 529 643
Burstyn, Inc. v. Wilson, 343 U.S. 495 787, 789
Bush v. Lucas, 462 U.S. 367 538, 542
Butz v. Economou, 438 U.S. 478 520, 521
Caban v. Mohammed, 441 U.S. 380 633

Page

Cafeteria Workers v. McElroy, 367 U.S. 886 454, 687, 690, 694
Caldor's Inc. v. Bedding Barn, Inc., 177 Conn. 304 705
Califano v. Sanders, 430 U.S. 99 450
California v. Beheler, 463 U.S. 1121 458
California v. Carney, 471 U.S. 386 461
California v. Ramos, 463 U.S. 992 326, 329, 335–337, 340–343, 347, 348, 351, 458, 462
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 484, 488
Canal Zone v. Brooks, 427 F. 2d 346 701
Can-Am Petroleum Co. v. Beck, 331 F. 2d 371 306
Cannon v. University of Chicago, 441 U.S. 677 205, 252
Cantwell v. Connecticut, 310 U.S. 296 49, 50, 68, 230, 502
Carey v. Brown, 447 U.S. 455 783
Carleson v. Yee-Litt, 412 U.S. 924 141
Carpenter v. Shaw, 280 U.S. 363 278
Carpenters v. NLRB, 357 U.S. 93 461
Case Co. v. Borak, 377 U.S. 426 310, 461
Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N. Y., 447 U.S. 557 233, 758, 762, 778, 792, 793
Central States, Southeast and Southwest Areas Pension Fund v. Theut Products, Civ. No. 82–71080 (ED Mich.) 582
Cepulonis v. Commissioner of Correction, 15 Mass. App. 292 451, 452
Champlin Refining Co. v. Corporation Comm'n of Okla., 286 U.S. 210 502, 507, 624
Chaplinsky v. New Hampshire, 315 U.S. 568 758

Page

Charge of Judicial Misconduct, In re, 595 F. 2d 517; 613 F. 2d 768 435
Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 576
Cheney v. Department of Justice, 720 F. 2d 1280 659
Cherokee Nation v. Georgia, 5 Pet. 1 256, 276
Cherokee News & Arcade, Inc. v. State, 533 P. 2d 624 467
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 659, 843, 863, 865
Chiarella v. United States, 445 U.S. 222 226, 313, 314
Chicago v. Atchison, T. & S. F. R. Co., 357 U.S. 77 806
Chicago Bd. of Trade v. United States, 246 U.S. 231 289
Childs v. Oregon, 431 F. 2d 272 505
Choctaw Nation v. United States, 318 U.S. 423 278
Citizens & Peoples National Bank of Pensacola v. United States, 570 F. 2d 1279 725, 744
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 133, 864, 865
City. See name of city.
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 504, 508
CSC v. Letter Carriers, 413 U.S. 548 503
Clark v. Community for Creative Non-Violence, 468 U.S. 288 688, 689
Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 842
Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532 149, 150
Cobbledick v. United States, 308 U.S. 323 544
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 430, 436, 440, 444, 518, 525, 527, 529, 537, 543, 544, 546, 549–551, 555
Cohen v. California, 403 U.S. 15 783

Page

Cohens v. Virginia, 6 Wheat. 264 872
Colautti v. Franklin, 439 U.S. 379 249
Cole v. Richardson, 405 U.S. 676 500
Columbia Broadcasting System, Inc. v. FCC, 453 U.S. 367 783
Commercial Bank of Cincinnati v. Buckingham's Executors, 5 How. 317 834
Committee for Public Ed. & Religious Liberty v. Nyquist, 413 U.S. 756 60, 64, 75, 82, 112
Committee for Public Ed. & Religious Liberty v. Regan, 444 U.S. 646 107, 111, 112
Commonwealth. See also name of Commonwealth.
Commonwealth v. Clapp, 4 Mass. 163 483
Commonwealth v. Isenstadt, 318 Mass. 543 498
Complaint of A. H. Robins Co., In re, JCP 84–001 (CA8 Judicial Council) 435
Connecticut Dept. of Income Maintenance v. Heckler, 471 U.S. 524 219
Connick v. Myers, 461 U.S. 138 759–761, 784, 789, 790
Consolidated Edison Co. v. Public Service Comm'n of N. Y., 447 U.S. 530 234, 792, 794
Construction Laborers v. Curry, 371 U.S. 542 525
Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 599, 604
Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 598
Coopers & Lybrand v. Livesay, 437 U.S. 463 431–433, 436, 438, 439, 443, 527, 543, 547, 554
Cort v. Ash, 422 U.S. 66 500
County. See name of county.
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 789

Page

Craig v. Boren, 429 U.S. 190 804
Crawford v. Burke, 195 U.S. 176 136
Crowell v. Benson, 285 U.S. 22 212, 450, 680
Culberson v. State, 370 So. 2d 499 328
Cupp v. Naughten, 414 U.S. 141 348, 420
Curtis Publishing Co. v. Butts, 388 U.S. 130 755, 766, 777
Dandridge v. Williams, 397 U.S. 471 25, 633
Datacon, Inc. v. Dun & Bradstreet, Inc., 465 F. Supp. 706 792
Data Probe Acquisition Corp. v. Datalab, Inc., 722 F. 2d 1 5
Davis v. Scherer, 468 U.S. 183 530, 537
Dawson v. Smith, 719 F. 2d 896 459
De Jonge v. Oregon, 299 U.S. 353 486
Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 255, 276
Delinger v. Belk, 34 N. C. App. 488 485
Denny v. Mertz, 106 Wis. 2d 636 753, 760
Dent v. West Virginia, 129 U.S. 114 228
Devine v. Brisco, 733 F. 2d 867 653, 673
Devine v. White, 225 U.S. App. D. C. 179 653, 656, 662, 669, 673
Diaz v. Pan American World Airways, Inc., 442 F. 2d 385 413
Dirks v. SEC, 463 U.S. 646 311–313
Dombrowski v. Eastland, 387 U.S. 82 520
Donnelly v. DeChristoforo, 416 U.S. 637 335, 337–340, 347, 348, 350
Doremus v. Board of Ed., 342 U.S. 429 804
Dothard v. Rawlinson, 433 U.S. 321 412

Page

Douglas v. Buder, 412 U.S. 430 455
Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 71
Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898 791
Dunn v. Blumstein, 405 U.S. 330 616
Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 290
Eddings v. Oklahoma, 455 U.S. 104 329, 330, 333, 343, 382, 396
Edwards v. South Carolina, 372 U.S. 229 488, 490
Edwards' Lessee v. Darby, 12 Wheat. 206 254
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 546, 812, 813
Electrical Workers v. Foust, 442 U.S. 42 780
Engel v. Vitale, 370 U.S. 421 54, 55, 60, 65, 68, 70–72, 84, 99
England v. Rockefeller, 739 F. 2d 140 519
Epperson v. Arkansas, 393 U.S. 97 60, 75
EEOC v. Wyoming, 460 U.S. 226 359–362, 410
Ernst & Ernst v. Hochfelder, 425 U.S. 185 6, 8, 12, 318
Escambia County v. McMillan, 466 U.S. 48 123, 190
Estin v. Estin, 334 U.S. 541 807
Evans v. Britton, 472 F. Supp. 707 376
Evans v. Dillahunty, 711 F. 2d 828 519
Everson v. Board of Ed., 330 U.S. 1 42, 53, 60, 64, 74, 91, 98, 104, 106–108, 111–113
Ex parte. See name of party.
Exxon Corp. v. Eagerton, 462 U.S. 176 23
Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 290, 294
FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 270

Page

FPC v. Tuscarora Indian Nation, 362 U.S. 99 257
Feldbaum v. Avon Products, Inc., 741 F. 2d 234 5
Fiallo v. Bell, 430 U.S. 787 876
Fidelity & Deposit Co. of Maryland v. New York City Housing Authority, 241 F. 2d 142 722
Field v. Clark, 143 U.S. 649 502
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 430–432, 435, 440–442, 547, 554
First National Bank v. Walker Bank & Trust Co., 385 U.S. 252 172
First National Bank of Boston v. Bellotti, 435 U.S. 765 759, 773, 781, 783
Flanagan v. United States, 465 U.S. 259 425, 430, 432–439, 442–444, 547
Fleming v. State, 240 Ga. 142 334
Flemming v. Nestor, 363 U.S. 603 129, 130
Florida v. Rodriguez, 469 U.S. 1 458
Flower v. United States, 407 U.S. 197 684–686, 698, 700, 701
Flying Eagle Publications, Inc. v. United States, 273 F. 2d 799 505
Ford Motor Credit Corp. v. Milhollin, 444 U.S. 555 865
Friedman v. Rogers, 440 U.S. 1 792
Frisbie v. Collins, 342 U.S. 519 475
Frost & Co. v. Coeur d'Alene Mines Corp., 312 U.S. 38 310, 311
Fuentes v. Shevin, 407 U.S. 67 148
Fuller v. Phillips Petroleum Co., 408 F. Supp. 643 841
Furman v. Georgia, 408 U.S. 238 329, 333, 334, 373, 388, 399
Furnco Construction Co. v. Waters, 438 U.S. 567 409
Fusari v. Steinberg, 419 U.S. 379 622

Page

Gaines v. Anderson, 421 F. Supp. 337 71
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 63
Garcia v. United States, 469 U.S. 70 680
Garcia v. United States, 43 F. 2d 873 281
Gardiner v. A. H. Robins Co., 747 F. 2d 1180 435
Gardner v. Florida, 430 U.S. 349 329, 399
Garland, Ex parte, 4 Wall. 333 643
Garner v. Louisiana, 368 U.S. 157 709
Garrison v. Louisiana, 379 U.S. 64 484, 487, 489, 773, 794
General Box Co. v. United States, 351 U.S. 159 500
George Moore Ice Cream Co. v. Rose, 289 U.S. 373 227
Gertz v. Robert Welch, Inc., 418 U.S. 323 751–761, 763–764, 766, 767, 769–775, 777, 779–781, 783–786, 793–795
Gibbs v. Paluk, 742 F. 2d 181 432
Giboney v. Empire Storage & Ice Co., 336 U.S. 490 228
Gillespie v. United States Steel Corp., 379 U.S. 148 524
Gillette v. United States, 401 U.S. 437 82
Gitlow v. New York, 268 U.S. 652 49
Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 795
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 804
Glass City Bank v. United States, 326 U.S. 265 720
Glenn v. Garth, 147 U.S. 360 834
G. M. Leasing Corp. v. United States, 429 U.S. 338 721
Godfrey v. Georgia, 446 U.S. 420 329
Goldberg v. Kelly, 397 U.S. 254 125, 128, 140, 147, 148, 150, 154

Page

Goldstein v. Allain, 568 F. Supp. 1377 505
Gooding v. Wilson, 405 U.S. 518 500
Goss v. Lopez, 419 U.S. 565 150
Government of Canal Zone v. Brooks, 427 F. 2d 346 701
Gravel v. United States, 408 U.S. 606 536
Gray v. Pentland, 2 Serg. & R. 23 483
Greer v. Spock, 424 U.S. 828 677, 684–687, 694
Gregg v. Georgia, 428 U.S. 153 381, 389, 392, 1012, 1022, 1033, 1034
Griffin v. California, 380 U.S. 609 340
Grosjean v. American Press Co., 297 U.S. 233 783
Grumet v. Shearson/American Express, Inc., 564 F. Supp. 336 305, 312, 315
Guaranty Trust Co. v. New York, 326 U.S. 99 835
Gulf Oil Co. v. Bernard, 452 U.S. 89 854
Hague v. CIO, 307 U.S. 496 49
Haig v. Agee, 453 U.S. 280 140
Halliburton Oil Well Co. v. Reily, 373 U.S. 64 23, 28, 35
Halperin v. Kissinger, 196 U.S. App. D. C. 285 519, 522
Hampton v. Mow Sun Wong, 426 U.S. 88 881
Hansberry v. Lee, 311 U.S. 32 808, 812
Hanson v. Denckla, 357 U.S. 235 805
Harbour v. Harbour, 207 Ark. 551 715
Haring v. Prosise, 462 U.S. 306 499
Harisiades v. Shaughnessy, 342 U.S. 580 758
Harley-Davidson Motorsports, Inc. v. Markley, 279 Ore. 361 753, 760
Harlow v. Fitzgerald, 457 U.S. 800 513, 517, 519, 521, 524–526, 530, 535–537, 540, 551–553

Page

Harman v. Forssenius, 380 U.S. 528 508, 510
Harris v. Huntington, 2 Tyler 129 483
Harrison v. NAACP, 360 U.S. 167 510
Harriss v. Pan American World Airways, Inc., 649 F. 2d 670 416, 421
Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 820
Haven Industries, Inc., In re, 462 F. Supp. 172 306, 318
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 508
Hawes v. State, 240 Ga. 327 334
Hayden v. Gardner, 238 Ark. 351 727
Hayse v. Hayse, 4 Ark. App. 160–B 741
Heckler v. Chaney, 470 U.S. 821 683, 880
Heckler v. Mathews, 465 U.S. 728 680
Heller v. New York, 413 U.S. 483 473
Helstoski v. Meanor, 442 U.S. 500 431, 525, 528, 537, 546, 555
Henneford v. Silas Mason Co., 300 U.S. 577 22–24
Henry v. Collins, 380 U.S. 356 773
Herb v. Pitcairn, 324 U.S. 117 326
Herbert v. Lando, 441 U.S. 153 774, 783
Herman & MacLean v. Huddleston, 459 U.S. 375 310
Hertz v. United States, 18 F. 2d 52 645
Higgins v. McCrea, 116 U.S. 671 306
Hintopoulos v. Shaughnessy, 353 U.S. 72 862
Hisquierdo v. Hisquierdo, 439 U.S. 572 130
Hodgson v. Greyhound Lines, Inc., 499 F. 2d 859 417, 419
Holdridge v. United States, 282 F. 2d 302 683, 701

Page

Holman v. Johnson, 1 Cowp. 341 306
Home Ins. Co. v. Dick, 281 U.S. 397 820–823, 838
Hood v. Dun & Bradstreet, Inc., 486 F. 2d 25 763
Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 174
Hopper v. Evans, 456 U.S. 605 378, 379, 389
H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 174
Hualpai Indians v. Santa Fe Pacific R. Co., 314 U.S. 339 258, 276
Hughes v. Oklahoma, 441 U.S. 322 174
Hugoton-Anadarko Area Rate Case, 466 F. 2d 974 828
Hunt v. McNair, 413 U.S. 734 69, 112
Illinois v. Andreas, 463 U.S. 765 458
Illinois v. Batchelder, 463 U.S. 1112 458
Illinois ex rel. McCollum v. Board of Ed., 333 U.S. 203 60, 61, 80, 99, 111
Imbler v. Pachtman, 424 U.S. 409 515, 516, 518, 520, 538, 541, 555
Inglese v. Warden, U.S. Penitentiary, 687 F. 2d 362 459
In re. See name of party or proceeding.
Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 807, 814
Interco Systems, Inc. v. Omni Corporate Services, Inc., 733 F. 2d 253 432
International Shoe Co. v. Washington, 326 U.S. 310 802, 805, 806
Investment Company Institute v. Camp, 401 U.S. 617 856, 857, 865
Iowa Independent Bankers v. Board of Governors, 167 U.S. App. D. C. 286 163

Page

Irvine v. California, 347 U.S. 128 461
Jackman v. Rosenbaum Co., 260 U.S. 22 80
Jackson v. Carlson, 707 F. 2d 943 459
Jackson v. Virginia, 443 U.S. 307 456
Jacobs v. State, 361 So. 2d 607 383
Jacobs v. State, 361 So. 2d 640 379, 384, 394, 398
Jacron Sales Co. v. Sindorf, 276 Md. 580 753
Jaffree v. Board of School Comm'rs of Mobile County, 459 U.S. 1314 47, 65
Jaffree v. James, 554 F. Supp. 1130 45
Jamison v. Texas, 318 U.S. 413 230
Jay v. Boyd, 351 U.S. 345 879
J. C. Penney Co. v. Hardesty, 164 W. Va. 525 29, 36
Jefferson Parish Hospital Dist. v. Hyde, 466 U.S. 2 296
Jewett v. Commissioner, 455 U.S. 305 133
J. I. Case Co. v. Borak, 377 U.S. 426 310, 461
John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 820, 838
Johnson v. American Airlines, Inc., 745 F. 2d 988 416
Johnson v. Mayor and City Council of Baltimore, 472 U.S. 353 418
Johnson v. New York Life Ins. Co., 187 U.S. 491 834, 845
Johnson v. Robison, 415 U.S. 361 450, 620, 626
Johnson v. United States, 333 U.S. 10 473
Johnson and Graham's Lessee v. McIntosh, 8 Wheat. 543 261, 276
Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 484, 488
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 141

Page

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 787, 789
Jurek v. Texas, 428 U.S. 262 383, 395
Kahle v. Oppenheimer & Co., 748 F. 2d 337 432, 439
Kaplan v. Tod, 267 U.S. 228 872, 878
Karlin v. Culkin, 248 N. Y. 465 644
Katz v. United States, 389 U.S. 347 469, 517, 531, 532
Keeton v. Hustler Magazine, Inc., 465 U.S. 770 782, 812
Kenyatta v. Moore, 744 F. 2d 1179 519, 550
Keys v. Wolfe, 709 F. 2d 413 304
Kirkland v. E. F. Hutton & Co., 564 F. Supp. 427 305, 315
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 832
Kleindienst v. Mandel, 408 U.S. 753 853, 875
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 290, 293, 294
Knauff v. Shaughnessy, 338 U.S. 537 869–872, 874–876, 879
Kolender v. Lawson, 461 U.S. 352 854
Konigsberg v. State Bar of Cal., 366 U.S. 36 189
Kotteakos v. United States, 328 U.S. 750 657, 668
Krohn v. United States, 742 F. 2d 24 519
Kuehnert v. Texstar Corp., 412 F. 2d 700 305, 312, 315–317
Kwong Hai Chew v. Colding, 344 U.S. 590 869, 871–875
Kyzer, Ex parte, 399 So. 2d 330 381, 392
Lake v. King, 1 Wms. Saund. 131 483
Landon v. Plasencia, 459 U.S. 21 875
Langston v. Levitt, 425 F. Supp. 642 621
Larkin v. Grendel's Den, Inc., 459 U.S. 116 112

Page

Larson v. Valente, 456 U.S. 228 107, 108, 112, 854
Leach v. American Booksellers Assn., Inc., 582 S. W. 2d 738 505
Lee Art Theatre v. Virginia, 392 U.S. 636 473
Leech v. Veterans' Bonus Division Appeals, 179 Conn. 311 622
Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 22, 34
Lemon v. Kurtzman, 403 U.S. 602 43, 55, 63–66, 68, 69, 75, 79, 82, 89, 107–110, 112, 708, 711
Leng May Ma v. Barber, 357 U.S. 185 860, 861, 878
Leverson v. Conway, 144 Vt. 523 17, 20, 24–26, 32
Levin v. Delta Air Lines, Inc., 730 F. 2d 994 419
Levitt v. Committee for Public Ed. and Religious Liberty, 413 U.S. 472 107, 111
Lewis v. Benedict Coal Co., 361 U.S. 459 576
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 174, 177
Lewis v. United States, 385 U.S. 206 469, 470
Lightcap v. Mobil Oil Corp., 221 Kan. 448 830
Lightner v. Jones, 752 F. 2d 1251 519
Lindahl v. Office of Personnel Management, 470 U.S. 768 662
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 25
Lisenba v. California, 314 U.S. 219 348
Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration, 113 U.S. 33 502
Lockett v. Ohio, 438 U.S. 586 329, 330, 333, 381
Logan v. Zimmerman Brush Co., 455 U.S. 422 130, 143, 150

Page

Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 468–470, 473
Lorain Journal Co. v. United States, 342 U.S. 143 601–603, 608, 610
Lorillard v. Pons, 434 U.S. 575 422
Louis v. Nelson, 544 F. Supp. 1004 850, 860, 866
Louis v. Nelson, No. 81-1260 (SD Fla.) 851
Louisville & Nashville R. Co. v. Melton, 218 U.S. 36 834
Lovell v. City of Griffin, 303 U.S. 444 189, 204, 205, 226, 227, 230
Lowe v. SEC, 472 U.S. 181 778
Lusardi v. Xerox Corp., 747 F. 2d 174 436
Lynch v. Donnelly, 464 U.S. 668 56, 61, 64, 68, 69, 74, 76, 78, 89, 107, 112, 113
Mackey v. Montrym, 443 U.S. 1 148
Maggio v. Williams, 464 U.S. 46 331
Malamphy v. Real-Tex Enterprises, Inc., 527 F. 2d 978 305
Mallis v. Bankers Trust Co., 615 F. 2d 68 306, 317
Mansfield v. Excelsior Refining Co., 135 U.S. 326 732, 735, 738–741, 747
Marbury v. Madison, 1 Cranch 137 230
Marcus v. Search Warrant, 367 U.S. 717 468, 472, 473
Marino v. Ragen, 332 U.S. 561 457
Marsh v. Alabama, 326 U.S. 501 502
Marsh v. Chambers, 463 U.S. 783 61, 63, 64, 68, 80, 81, 112
Massachusetts v. Upton, 466 U.S. 727 462
Mathews v. Diaz, 426 U.S. 67 875
Mathews v. Eldridge, 424 U.S. 319 128, 147, 149–151, 153, 155, 157
Mattz v. Arnett, 412 U.S. 481 276, 277
Maxey v. Texas Commerce Bank, 580 S. W. 2d 340 817
May v. Copperman, 572 F. Supp. 1561 71
McAlister v. Kleindienst, Civ. Action No. 72-1977 (ED Pa.) 522
McAnally v. Ideal Federal Credit Union, 428 P. 2d 322 840
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 278
McCollum v. Board of Ed., 333 U.S. 203 60, 61, 80, 99, 111
McGautha v. California, 402 U.S. 183 329
McGowan v. Maryland, 366 U.S. 420 74, 80
McMullen v. Hoffman, 174 U.S. 639 306
McSurely v. McClelland, 225 U.S. App. D. C. 67 519
McSweeney v. Town Manager of Lexington, 379 Mass. 794 452
Meek v. Pittenger, 421 U.S. 349 107, 110–112
Memoirs v. Massachusetts, 383 U.S. 413 497
Memorial Hospital v. Maricopa County, 415 U.S. 250 616, 618
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 147, 149, 152, 154, 155
Menominee Tribe v. United States, 391 U.S. 404 277
Mercantile National Bank v. Langdeau, 371 U.S. 555 525
Metromedia, Inc. v. San Diego, 453 U.S. 490 788, 792
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 176–180
Mezei v. Shaughnessy, 101 F. Supp. 66 869
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 783
Michigan v. Long, 463 U.S. 1032 327, 328
Miguel v. Department of Army, 727 F. 2d 1081 659
Miller v. California, 413 U.S. 15 76, 474, 494, 497, 499, 501, 506, 509, 778
Miller v. Pate, 386 U.S. 1 351

Page

Mills v. Alabama, 384 U.S. 214 783
Mine Workers v. Illinois Bar Assn., 389 U.S. 217 485, 486, 490
Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue., 460 U.S. 575 783, 1002, 1003
Missouri v. Becker, 364 Mo. 1079 498
Mobil Corp. v. Marathon Oil Co., 669 F. 2d 366 5
Mobile v. Bolden, 446 U.S. 55 854
Moholt v. Dean Witter Reynolds, Inc., 478 F. Supp. 451 306
Monroe v. United Air Lines, Inc., 736 F. 2d 394 416
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 601
Montana v. Blackfeet Tribe, 471 U.S. 759 277
Montgomery Ward & Co. v. State Bd. of Equalization, 272 Cal. App. 2d 728 22
Moody v. Main Bank of Houston, 667 S. W. 2d 613 840
Moore Ice Cream Co. v. Rose, 289 U.S. 373 227
Morgan v. Commissioner, 309 U.S. 78 722, 742, 746
Morton v. Ruiz, 415 U.S. 199 270
Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29 133, 865, 866
Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 880
Mueller v. Allen, 463 U.S. 388 56, 66, 68, 107, 112
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 148, 150, 152, 154, 157, 807, 812
Murdock v. City of Memphis, 20 Wall. 590 709
Murnane v. American Airlines, Inc., 215 U.S. App. D. C. 55 419
Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 569

Page

Nathanson v. Weis, Voisin, Cannon, Inc., 325 F. Supp. 50 306, 315, 317
NAACP v. Button, 371 U.S. 415 490, 503, 777
NAACP v. Claiborne Hardware Co., 458 U.S. 886 488, 490
National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85 290, 295, 296, 598
NLRB v. Amax Coal Co., 453 U.S. 322 570, 577
Near v. Minnesota ex rel. Olson, 283 U.S. 697 49, 204, 226, 227, 230, 232, 234, 235, 758
Nelson v. Commissioner of Correction, 390 Mass. 379 453, 460
Nevada v. Hall, 440 U.S. 410 843
New Jersey v. T. L. O., 469 U.S. 325 475
New Mexico v. Aamodt, 537 F. 2d 1102 281
New Orleans v. Dukes, 427 U.S. 297 627
Newport v. Fact Concerts, Inc., 453 U.S. 247 780
New York v. Ferber, 458 U.S. 747 503, 508
New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 807
New York Times Co. v. Sullivan, 376 U.S. 254 485–487, 489, 490, 754–756, 758, 759, 761–767, 769–779, 784, 785, 792
New York Times Co. v. United States, 403 U.S. 713 234, 783
New York Trust Co. v. Eisner, 256 U.S. 345 79
Ng Fung Ho v. White, 259 U.S. 276 450
Nixon v. Fitzgerald, 457 U.S. 731 482, 518, 520, 525, 528, 530, 538, 542, 543, 546, 555
Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 276
Northern Pacific R. Co. v. United States, 356 U.S. 1 289, 293

Page

North Laramie Land Co. v. Hoffman, 268 U.S. 276 130
Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 604, 608
Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 254
Ohralik v. Ohio State Bar Assn., 436 U.S. 447 189, 210, 758, 792, 795
Oklahoma v. Texas, 272 U.S. 21 281
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 225
Olmstead v. United States, 277 U.S. 438 531
Oneida County v. Oneida Indian Nation, 470 U.S. 226 241, 276, 277
Oneida Indian Nation v. County of Oneida, 414 U.S. 661 258, 276
1001 Plays, Inc. v. Mayor of Boston, 387 Mass. 879 452
Orr v. Orr, 440 U.S. 268 754
Ortwein v. Schwab, 410 U.S. 656 449, 450
Orzel v. City of Wauwatosa Fire Dept., 697 F. 2d 743 416, 417, 419, 421
Otten v. Baltimore & Ohio R. Co., 205 F. 2d 58 710
Pacific Employees Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 822
Pait v. State, 112 So. 2d 380 334
Palmer v. Hoffman, 318 U.S. 109 500
Panduit Corp. v. All States Plastics Mfg. Co., 744 F. 2d 1564 432
Panter v. Marshall Field & Co., 646 F. 2d 271 10
Paris Adult Theatre I v. Slaton, 413 U.S. 49 472, 508, 510
Parker v. Brown, 317 U.S. 341 552
Park 'N Fly v. Dollar Park and Fly, Inc., 469 U.S. 189 680
Parmelee v. United States, 72 App. D. C. 203 498

Page

Passenger Cases, 7 How. 283 623
Paul v. Davis, 424 U.S. 693 793
Pell v. Procunier, 417 U.S. 817 773
Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93 834, 835
Penthouse International, Ltd. v. McAuliffe, 610 F. 2d 1353 474
People v. Johnson, 284 N. Y. 182 334
People v. Morse, 60 Cal. 2d 631 334
People v. Ridens, 51 Ill. 2d 410 467
People ex rel. Karlin v. Culkin, 248 N. Y. 465 644
Perlman v. First National Bank of Chicago, 15 Ill. App. 3d 784 829
Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 305, 307, 309, 310, 312, 318
Permoli v. Municipality No. 1 of New Orleans, 3 How. 589 49
Perry Ed. Assn. v. Perry Local Educators' Assn., 460 U.S. 37 689
Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 620
Phelps v. United States, 421 U.S. 330 720
Philadelphia Welfare Rights Organization v. O'Bannon, 525 F. Supp. 1055 156
Phillips v. Commissioner, 283 U.S. 589 721
Phillips Petroleum v. Duckworth, No. 82–54608 (Kan.) 801, 810
Phillips Petroleum Co. v. Adams, 513 F. 2d 355 817, 841
Phillips Petroleum Co. v. Riverside Gas Compression Co., 409 F. Supp. 486 818, 833, 841
Phillips Petroleum Co. v. Stahl Petroleum Co., 569 S. W. 2d 480 817, 831, 841

Page

Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 825
Pierson v. Ray, 386 U.S. 547 499, 525, 526, 538, 541, 555
Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 8, 10
Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376 783, 790
Plains Electric Generation & Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F. 2d 1375 281
Plyler v. Doe, 457 U.S. 202 875
Police Dept. of Chicago v. Mosley, 408 U.S. 92 783
Ponte v. Real, 471 U.S. 491 455, 459–461
Preston Farm & Ranch Supply, Inc. v. Bio-Zyme Enterprises, 625 S. W. 2d 295 840
Prince v. Massachusetts, 321 U.S. 158 50
Proffitt v. Florida, 428 U.S. 242 382, 383, 398
Propper v. Clark, 337 U.S. 472 500
Prudential Ins. Co. v. Benjamin, 328 U.S. 408 179
Prueitt v. State, 261 So. 2d 119 328
Pueblo of Nambe v. Romero, 10 N. M. 58 241
Pueblo of Santa Rosa v. Fall, 273 U.S. 315 259, 280, 282
Queen v. Hicklin, [1868] L. R. 3 Q. B. 360 501
Quick Bear v. Leupp, 210 U.S. 50 104
Radiant Burners, Inc. v. People Gas Light & Coke Co., 364 U.S. 656 290, 294
Raffaele v. Granger, 196 F. 2d 620 728, 743
Railroad Comm'n v. Pullman Co., 312 U.S. 496 495, 508, 509
Randall v. H. Nakashima & Co., 542 F. 2d 270 727
Reading v. Attorney General, 362 Mass. 266 451

Page

Red Bluff Drive-In, Inc. v. Vance, 648 F. 2d 1020 505
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 783
Regan v. Farmers' Loan & Trust Co., 154 U.S. 362 502
Regan v. Taxation with Representation of Washington, 461 U.S. 540 22, 620, 626, 629
Regan v. Time, Inc., 468 U.S. 641 206
Reiter v. Sonotone Corp., 442 U.S. 330 219
Rendezvous Trails of America, Inc. v. Ayers, 612 P. 2d 1384 817
Rescue Army v. Municipal Court, 331 U.S. 549 213
Respublica v. Oswald, 1 Dall. 319 776
Reynolds v. United States, 98 U.S. 145 91, 92
Richardson v. Belcher, 404 U.S. 78 129
Richardson v. Perales, 402 U.S. 389 129
Richardson v. State, 376 So. 2d 205 384
Richardson-Merrell Inc. v. Koller, 472 U.S. 424 529, 547, 549, 555
Rinaldi v. Yeager, 384 U.S. 305 27
Ritter v. Smith, 726 F. 2d 1505 374, 378, 391
Ritter v. Smith, 568 F. Supp. 1499 398
Ritter v. State, 429 So. 2d 928 385, 399
R. M. J., In re, 455 U.S. 191 235, 792
Roaden v. Kentucky, 413 U.S. 496 468, 469, 473–475
Roberts v. U. S. District Court, 339 U.S. 844 547, 555
Roberts (Harry) v. Louisiana, 431 U.S. 633 380
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 379, 395
Rodriguez-Fernandez v. Wilkinson, 654 F. 2d 1382 868

Page

Roemer v. Maryland Bd. of Public Works, 426 U.S. 736 107, 109, 710
Roller v. Holly, 176 U.S. 398 148
Rondeau v. Moisnee Paper Corp., 422 U.S. 49 8
Rosenblatt v. Baer, 383 U.S. 75 769, 793
Rosenbloom v. Metromedia, Inc., 403 U.S. 29 755, 756, 759, 766, 767, 769, 771, 777, 779, 780, 785, 791
Ross v. Moffitt, 417 U.S. 600 460
Rostker v. Goldberg, 453 U.S. 57 230
Roth v. United States, 354 U.S. 476 496–501, 504–506, 758
Rowe v. Metz, 195 Colo. 424 753, 760
Rowe-Genereux, Inc. v. Department of Taxes, 138 Vt. 130 24
Rusher v. Arnold, 550 F. 2d 896 459
Russell v. City of Wildwood, 428 F. 2d 1176 793
Russell v. Hodges, 470 F. 2d 212 620
Russian Volunteer Fleet v. United States, 282 U.S. 481 873
St. Joseph Stockyards Co. v. United States, 298 U.S. 38 449
St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 294
San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 22
Santa Fe Industries, Inc. v. Green, 430 U.S. 462 7, 8
Saxbe v. Washington Post Co., 417 U.S. 843 783
Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 225, 230, 503
Schneider v. State, 308 U.S. 147 225, 230, 234, 235
Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 562, 575–577, 580
Schware v. Board of Bar Examiners, 353 U.S. 232 228, 229, 455

Page

Schweicker v. Wilson, 450 U.S. 221 23
Scott v. Brown, Doering, McNab & Co., [1892] 2 Q. B. 724 7
Scott v. Sandford, 19 How. 393 875
Scott v. United States, 436 U.S. 128 470
Sebel v. Lytton Savings & Loan Assn., 65-1 USTC ¶9343 725, 745
Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 503, 504
SEC v. Blavin, 557 F. Supp. 1304 226
SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 190, 194, 215, 224, 225, 315
SEC v. Sloan, 436 U.S. 103 207
SEC v. Wall Street Transcript Corp., 422 F. 2d 1371 187, 206, 207, 216, 218
Securities Industry Assn. v. Board of Governors, FRS, 468 U.S. 207 8, 168
Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498 793
Seminole Nation v. United States, 316 U.S. 286 278
Shaffer v. Heitner, 433 U.S. 186 806
Shapiro v. Kansas Public Employees Retirement System, 216 Kan. 353 830
Shapiro v. Thompson, 394 U.S. 618 616, 618, 620, 623
Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 868–872, 874–879
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 569
Shaw v. U. S. Postal Service, 697 F. 2d 1078 659
Sherbert v. Verner, 374 U.S. 398 58, 81
Shuttlesworth v. Birmingham, 394 U.S. 147 686
Shutts, Executor v. Phillips Petroleum Co., 222 Kan. 527 801, 802, 822, 824–831, 833, 835, 838, 839, 841, 843

Page

Sibron v. New York, 392 U.S. 40 867
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 780
Silver v. New York Stock Exchange, 373 U.S. 341 288, 289, 291–294
Silverberg v. Paine, Webber, Jackson & Curtis, Inc., 710 F. 2d 678 306
Silverman v. United States, 365 U.S. 505 531
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 804
Sinclair v. Kleindienst, 207 U.S. App. D. C. 155 519, 522
Singleton v. Wulff, 428 U.S. 106 804, 805
Skidmore v. Swift & Co., 323 U.S. 134 216, 270
Smallwood v. United Air Lines, Inc., 661 F. 2d 303 416
Smith v. California, 361 U.S. 147 789
Smith v. Nixon, 196 U.S. App. D. C. 276 522
Smith v. Robinson, 594 P. 2d 364 817
Smith v. Wade, 461 U.S. 30 780
Sosna v. Iowa, 419 U.S. 393 616
Soto-Lopez v. New York City Civil Service Comm'n, 755 F. 2d 266 622
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 174
South Dakota v. Neville, 459 U.S. 553 462
Southern Pacific Co. v. Gallagher, 306 U.S. 167 22
Spaziano v. Florida, 468 U.S. 447 389, 393, 398
Spector Motor Co. v. McLaughlin, 323 U.S. 101 854
Speiser v. Randall, 357 U.S. 513 778
Spock v. David, 469 F. 2d 1047 695
Spokane Arcades, Inc. v. Brockett, 631 F. 2d 135 493, 506

Page

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 174
Sprague v. Ticonic National Bank, 307 U.S. 161 829
Stack v. Boyle, 342 U.S. 1 525, 546
Stahl Petroleum Co. v. Phillips Petroleum Co., 550 S. W. 2d 360 831
Standard Oil Co. v. United States, 221 U.S. 1 289
Stanford v. Texas, 379 U.S. 476 468, 472, 473, 477
Starr v. Long Jim, 227 U.S. 613 276
State. See also name of State.
State v. Anderson, 81 Wash. 2d 234 506
State v. Anonymous, 33 Conn. Supp. 55; 33 Conn. Supp. 141 705
State v. Dornblaser, 26 Ohio Misc. 29 467
State v. Furuyama, 64 Haw. 109 467, 474
State v. Gilbert, 273 S. C. 690 334
State v. Jones, 296 N. C. 495 334
State v. J–R Distributors, Inc., 82 Wash. 2d 584 506, 509
State v. Perry, 567 S. W. 2d 380 467
State v. Spearman, 84 N. M. 366 624
State v. Welke, 298 Minn. 402 467
State v. White, 286 N. C. 395 334
State v. Willie, 410 So. 2d 1019 334
Stephenson v. Calpine Conifers II, Ltd., 652 F. 2d 808 304
Stewart v. Wright, 147 F. 321 314
Stone v. Graham, 449 U.S. 39 56, 60, 64
Street v. New York, 394 U.S. 576 76
Stuempges v. Parke, Davis & Co., 297 N. W. 2d 252 753
Stump v. Sparkman, 435 U.S. 349 520
Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6 309

Page

Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 547, 555
Tarasi v. Pittsburgh National Bank, 555 F. 2d 1152 305, 307, 312, 315, 318
Taunton Eastern Little League v. Taunton, 389 Mass. 719 451, 453
Tcherepnin v. Knight, 389 U.S. 332 225
Tennessee v. Garner, 471 U.S. 1 80, 502
Tenney v. Brandhove, 341 U.S. 367 520–522, 538, 555
Terminiello v. Chicago, 337 U.S. 1 49
Territory. See name of territory.
Texaco, Inc. v. Short, 454 U.S. 516 24, 130, 131, 142, 144, 145
Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 409
Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 316
Theard v. United States, 354 U.S. 278 643
Thomas v. Collins, 323 U.S. 516 230, 231, 234, 485, 490, 759
Thomas v. Review Board, Ind. Employment Security Div., 450 U.S. 707 58, 81
Thomas v. Washington Gas Light Co., 448 U.S. 261 836
Thornhill v. Alabama, 310 U.S. 88 503, 759, 787–789
Three Affiliated Tribes of Berthold Reservation v. Wold Engineering, 467 U.S. 138 854
Tilton v. Richardson, 403 U.S. 672 75, 81, 107, 112
Time, Inc. v. Hill, 385 U.S. 374 506, 777, 783
Tisi v. Tod, 264 U.S. 131 456
Torcaso v. Watkins, 367 U.S. 488 53
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 712
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 403

Page

Trop v. Dulles, 356 U.S. 86 230
Tulee v. Washington, 315 U.S. 681 256
Tungus, The v. Skovgaard, 358 U.S. 588 500
Tuohy v. Ford Motor Co., 675 F. 2d 842 416, 419, 421
Tuohy v. Ford Motor Co., 490 F. Supp. 258 417
Tyson v. United States, 63–1 USTC ¶9300 725, 744
Ulster County Court v. Allen, 442 U.S. 140 327, 328
Union Trust Co. v. United States, 617 F. 2d 1293 725
United Air Lines, Inc. v. McMann, 434 U.S. 192 405
United Sand & Gravel Contractors, Inc. v. United States, 624 F. 2d 733 729
United States v. Aluminum Co. of America, 148 F. 2d 416 602, 603
United States v. Bess, 357 U.S. 51 722, 724, 726, 727, 735, 742, 745–747
United States v. Blue, 384 U.S. 251 476
United States v. Board of National Missions of Presbyterian Church, 37 F. 2d 272 281
United States v. Brown, 333 U.S. 18 697
United States v. Brown, 5 F. Supp. 81 7
United States v. Candelaria, 271 U.S. 432 245, 259, 280, 282
United States v. Casimiro-Benitez, 533 F. 2d 1121 873
United States v. Champlin Refining Co., 341 U.S. 290 59
United States v. Chavez, 290 U.S. 357 259, 280, 282
United States v. Citizens & Southern National Bank, 422 U.S. 86 600
United States v. Citizens & Southern National Bank, 538 F. 2d 1101 719, 725, 726, 744
United States v. Clark, 445 U.S. 23 216

Page

United States v. Clay, CR. No. 67–H–94 (SD Tex.) 533
United States v. Colgate & Co., 250 U.S. 300 601
United States v. Creek Nation, 295 U.S. 103 276
United States v. Crews, 445 U.S. 463 468, 471, 475, 476
United States v. Cruikshank, 92 U.S. 542 482, 486
United States v. Dellinger, No. 69 CR 180 533
United States v. Dennett, 39 F. 2d 564 498
United States v. Douglass, 579 F. 2d 545 701
United States v. Durham Lumber Co., 363 U.S. 522 500
United States v. Eiland, 223 F. 2d 118 720
United States v. Equitable Trust Co., 49 AFTR 2d ¶82–428 725, 745
United States v. First National Bank of Arizona, 348 F. Supp. 388 725, 726, 744
United States v. Flower, 452 F. 2d 80 685
United States v. General Motors Corp., 384 U.S. 127 290
United States v. Gerlach Livestock Co., 339 U.S. 725 854
United States v. Gourley, 502 F. 2d 785 701
United States v. Grace, 461 U.S. 171 503, 680, 686
United States v. Grinnell Corp., 384 U.S. 563 596
United States v. Hasting, 461 U.S. 499 462, 657, 668
United States v. Henry, 604 F. 2d 908 873
United States v. Hollywood Motor Car Co., 458 U.S. 263 430, 525, 547
United States v. International Minerals & Chemical Corp., 402 U.S. 558 683
United States v. Jacobsen, 466 U.S. 109 469

Page

United States v. Jelinski, 411 F. 2d 476 701
United States v. Johnston, 268 U.S. 220 461
United States v. Joseph, 94 U.S. 614 241–243, 252, 259, 260, 280, 283
United States v. Kirby, 7 Wall. 482 699
United States v. Knotts, 460 U.S. 276 469
United States v. Larionoff, 431 U.S. 864 865
United States v. Leon, 468 U.S. 897 475
United States v. Locke, 471 U.S. 84 273, 680, 854, 858
United States v. Lucero, 1 N. M. 422 241, 259
United States v. MacDonald, 435 U.S. 850 555
United States v. Mares, 14 N. M. 1 241, 242
United States v. May, 622 F. 2d 1000 701
United States v. Mitchell, 463 U.S. 206 256, 278
United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694 270
United States v. National City Lines, Inc., 337 U.S. 78 60
United States v. New England Merchants National Bank, 465 F. Supp. 83 728
United States v. O'Brien, 391 U.S. 367 688, 689
United States v. O'Neal, No. KC–CR–1204 (Kan.) 533
United States v. One Book Called "Ulysses," 5 F. Supp. 182 498
United States v. Park, 421 U.S. 658 421
United States v. Parrilla Bonilla, 648 F. 2d 1373 683
United States v. Quilty, 741 F. 2d 1031 700
United States v. Raines, 362 U.S. 17 501, 502

Page

United States v. Rodgers, 461 U.S. 677 720–722, 725, 731, 734, 739–742
United States v. Sandoval, 231 U.S. 28 242, 243, 252, 259–262, 280, 282, 283
United States v. Sinclair, 321 F. Supp. 1074 533
United States v. Smith, 321 F. Supp. 424 533
United States v. Sterling National Bank & Trust Co. of N. Y., 494 F. 2d 919 719, 722, 725, 744
United States v. Stock Yards Bank of Louisville, 231 F. 2d 628 728, 743
United States v. Sullivan, 333 F. 2d 100 736
United States v. Terminal Railroad Assn. of St. Louis, 224 U.S. 383 599
United States v. Third Nat. Bank & Trust Co., 111 F. Supp. 152 725, 744
United States v. 35 MM. Motion Picture Film Entitled "Language of Love," 432 F. 2d 705 505
United States v. Topco Associates, Inc., 405 U.S. 596 589
United States v. Turkette, 452 U.S. 576 680
United States v. U. S. District Court, 407 U.S. 297 515, 517, 518, 520, 522, 523, 530–535, 539, 540, 542
United States v. U.S. District Court for Eastern Dist. of Mich., 444 F. 2d 651 533, 540
United States v. United States Gypsum Co., 438 U.S. 422 697
United States v. University of N. M., 731 F. 2d 703 281, 282
United States as Guardian of Pueblo of Acoma v. Arvizon, Equity No. 2079 (NM) 281
United States as Guardian of Pueblo of Laguna v. Armigo, Equity No. 2080 (NM) 281
United States ex rel. Hualpai Indians v. Santa Fe Pacific R. Co., 314 U.S. 339 258, 276

Page

United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 869–872, 874–876, 879
United States ex rel. Mezei v. Shaughnessy, 101 F. Supp. 66 869
United States ex rel. Tisi v. Tod, 264 U.S. 131 456
United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U.S. 103 455
U.S. Postal Service v. Greenburgh Civic Assns., 453 U.S. 114 686
United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 130, 422
United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 176
Upper Darby National Bank v. Myers, 386 Pa. 12 172
Usery v. Tamiami Trail Tours, Inc., 531 F. 2d 224 359, 412–418, 420, 421
Vajtauer v. Commissioner of Immigration, 273 U.S. 103 455
Valley Finance, Inc. v. United States, 203 U.S. App. D. C. 128 729
Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 81, 804
Vance v. Bradley, 440 U.S. 93 178, 356, 633
Vargas v. Trainor, 508 F. 2d 485 149
Vicksburg v. Henson, 231 U.S. 259 281
Village. See name of village.
Virginia v. Tennessee, 148 U.S. 503 175, 176
Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 234, 758, 762, 778, 788–790, 793
Vlandis v. Kline, 412 U.S. 441 623
Wallace v. Jaffree, 466 U.S. 924 41, 48, 62

Page

Wallace v. Jaffree, 472 U.S. 38 712
Walter v. West Virginia Bd. of Ed., Civ. Action No. 84–5366 (SD W. Va.) 71
Walz v. Tax Comm'n, 397 U.S. 664 64, 67, 68, 78, 80, 82, 109, 110, 113
Ward v. Illinois, 431 U.S. 767 506
Washington v. Chrisman, 455 U.S. 1 462
Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658 276
Watson v. Buck, 313 U.S. 387 502
Wayte v. United States, 470 U.S. 598 690
Webster Drilling Co. v. Sterling Oil of Oklahoma, Inc., 376 P. 2d 236 817, 840, 841
Weeks v. Southern Bell Telephone & Telegraph Co., 408 F. 2d 228 414
Weinberg v. Mitchell, 588 F. 2d 275 522
Weissman v. United States, 387 F. 2d 271 701
Welsh v. United States, 398 U.S. 333 83
West Edmond Hunton Lime Unit v. Young, 325 P. 2d 1047 817, 840
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 362, 363
Western Life Indemnity Co. v. Rupp, 235 U.S. 261 834, 836
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 174
West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624 49, 54, 55, 61
Wheeling Steel Corp. v. Glander, 337 U.S. 562 23, 24
White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 174
White v. Nichols, 3 How. 266 482–484
White Motor Co. v. United States, 372 U.S. 253 293

Page

Whitney v. California, 274 U.S. 357 49, 783, 787
WHYY v. Glassboro, 393 U.S. 117 23
Widmar v. Vincent, 454 U.S. 263 51, 56, 73
Will v. United States, 389 U.S. 90 436
Williams v. State, 445 So. 2d 798 328, 334, 343, 352
Willis v. Ciccone, 506 F. 2d 1011 456, 459
Wilson v. Garcia, 471 U.S. 261 700
Wisconsin v. Yoder, 406 U.S. 205 81
Witherspoon v. Illinois, 391 U.S. 510 395
Wohl v. Blair & Co., 50 F. R. D. 89 306, 315
Wolff v. McDonnell, 418 U.S. 539 449, 453–456
Wolfson v. Baker, 623 F. 2d 1074 318
Wolman v. Walter, 433 U.S. 229 56, 107, 109–111
Wong Wing v. United States, 163 U.S. 228 873
Wood v. State, 144 Ga. App. 236 467
Wood v. Strickland, 420 U.S. 308 515
Woodson v. North Carolina, 428 U.S. 280 323, 329, 330, 333, 340, 347, 379, 380, 382, 394, 395, 399
Wooley v. Maynard, 430 U.S. 705 49, 52
Woolf v. S. D. Cohn & Co., 515 F. 2d 591 305, 317
World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 806, 807
Wurzlow v. Placid Oil Co., 279 So. 2d 749 817
Xaphes v. Shearson, Hayden, Stone, Inc., 508 F. Supp. 882 306
Yee-Litt v. Richardson, 353 F. Supp. 996 141, 154
Yick Wo v. Hopkins, 118 U.S. 356 875, 879
Yiu Sing Chun v. Sava, 708 F. 2d 869 868

Page

Young v. United States, 315 U.S. 257 856, 867
Yu Cong Eng v. Trinidad, 271 U.S. 500 212, 858
Zant v. Stephens, 462 U.S. 862 340, 348, 350, 351, 382, 389, 396
Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 225, 233, 235, 778, 790, 792, 793
Zenith Radio Corp. v. United States, 437 U.S. 443 254
Zobel v. Williams, 457 U.S. 55 24, 28, 617, 618, 620–625, 629
Zorach v. Clauson, 343 U.S. 306 73, 111
Zweibon v. Mitchell, 231 U.S. App. D. C. 398 519, 522
Zweig v. Hearst Corp., 594 F. 2d 1261 209

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1984

SCHREIBER *v.* BURLINGTON NORTHERN, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83–2129. Argued January 9, 1985—Decided June 4, 1985

In December 1982, respondent Burlington Northern, Inc., made a hostile tender offer for El Paso Gas Co. to which a majority of El Paso's shareholders ultimately subscribed. Burlington did not accept the tendered shares, and instead, in January 1983, after negotiations with El Paso, announced a new and friendly takeover agreement. Pursuant to this agreement, Burlington undertook to rescind the December tender offer and substitute a new tender offer. The January tender offer was soon oversubscribed. The rescission of the first tender offer caused a diminished payment to those shareholders who had tendered during the first offer, because those shareholders who retendered were subject to substantial proration. Petitioner filed suit in Federal District Court on behalf of herself and similarly situated shareholders, alleging that Burlington, El Paso, and members of El Paso's board of directors had violated § 14(e) of the Securities Exchange Act of 1934, which prohibits "fraudulent, deceptive, or manipulative acts or practices . . . in connection with any tender offer." She claimed that Burlington's withdrawal of the December tender offer, coupled with the substitution of the January tender offer, was a "manipulative" distortion of the market for El Paso stock. The District Court dismissed the suit for failure to state a claim, holding that the alleged manipulation did not involve a misrepresentation, and so did not violate § 14(e). The Court of Appeals affirmed.

Held:

1. "Manipulative" acts under § 14(e) require misrepresentation or nondisclosure. To read the term "manipulative" in § 14(e) to include acts that, although fully disclosed, "artificially" affect the price of the takeover target's stock, conflicts with the normal meaning of the term as connoting conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities. Pp. 5–8.

2. This interpretation of the term "manipulative" as used in § 14(e) is supported by the provision's purpose and legislative history. The purpose of the Williams Act, which added § 14(e) to the Securities Exchange Act, was to ensure that public shareholders who are confronted with a tender offer will not be required to respond without adequate information. Nowhere in the legislative history is there any suggestion that § 14(e) serves any purpose other than disclosure, or that the term "manipulative" should be read as an invitation to the courts to oversee the substantive fairness of tender offers; the quality of any offer is a matter for the marketplace. Pp. 8–12.

3. Applying the above interpretation of the term "manipulative" to this case, respondents' actions were not manipulative. Pp. 12–13.

731 F. 2d 163, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case, and O'CONNOR, J., who took no part in the consideration or decision of the case.

Irving Bizar argued the cause and filed briefs for petitioner.

Marc P. Cherno argued the cause for respondents. With him on the brief were *Robert K. Payson*, *Harvey L. Pitt*, *Stephen D. Alexander*, *A. Gilchrist Sparks III*, and *Howard W. Goldstein*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict in the Circuits over whether misrepresentation or nondisclosure is a necessary element of a violation of § 14(e) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(e).

I

On December 21, 1982, Burlington Northern, Inc., made a hostile tender offer for El Paso Gas Co. Through a wholly

owned subsidiary, Burlington proposed to purchase 25.1 million El Paso shares at $24 per share. Burlington reserved the right to terminate the offer if any of several specified events occurred. El Paso management initially opposed the takeover, but its shareholders responded favorably, fully subscribing the offer by the December 30, 1982, deadline.

Burlington did not accept those tendered shares; instead, after negotiations with El Paso management, Burlington announced on January 10, 1983, the terms of a new and friendly takeover agreement. Pursuant to the new agreement, Burlington undertook, *inter alia*, to (1) rescind the December tender offer, (2) purchase 4,166,667 shares from El Paso at $24 per share, (3) substitute a new tender offer for only 21 million shares at $24 per share, (4) provide procedural protections against a squeeze-out merger[1] of the remaining El Paso shareholders, and (5) recognize "golden parachute"[2] con-

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[1] A "squeeze-out" merger occurs when Corporation A, which holds a controlling interest in Corporation B, uses its control to merge B into itself or into a wholly owned subsidiary. The minority shareholders in Corporation B are, in effect, forced to sell their stock. The procedural protection provided in the agreement between El Paso and Burlington required the approval of non-Burlington members of El Paso's board of directors before a squeeze-out merger could proceed. Burlington eventually purchased all the remaining shares of El Paso for $12 cash and one-quarter share of Burlington preferred stock per share. The parties dispute whether this consideration was equal to that paid to those tendering during the January tender offer.

[2] Petitioner alleged in her complaint that respondent Burlington failed to disclose that four officers of El Paso had entered into "golden parachute" agreements with El Paso for "extended employment benefits in the event El Paso should be taken over, which benefits would give them millions of dollars of extra compensation." The term "golden parachute" refers generally to agreements between a corporation and its top officers which guarantee those officers continued employment, payment of a lump sum, or other benefits in the event of a change of corporate ownership. As described in the Schedule 14D–9 filed by El Paso with the Securities and Exchange Commission on January 12, 1983, El Paso entered into "employment agreements" with two of its officers for a period of not less than five years, and with two other officers for a period of three years. The Schedule 14D–9 also disclosed that El Paso's Deferred Compensation Plan had

tracts between El Paso and four of its senior officers. By February 8, more than 40 million shares were tendered in response to Burlington's January offer, and the takeover was completed.

The rescission of the first tender offer caused a diminished payment to those shareholders who had tendered during the first offer. The January offer was greatly oversubscribed and consequently those shareholders who retendered were subject to substantial proration. Petitioner Barbara Schreiber filed suit on behalf of herself and similarly situated shareholders, alleging that Burlington, El Paso, and members of El Paso's board of directors violated § 14(e)'s prohibition of "fraudulent, deceptive, or manipulative acts or practices . . . in connection with any tender offer." 15 U. S. C. § 78n(e). She claimed that Burlington's withdrawal of the December tender offer coupled with the substitution of the January tender offer was a "manipulative" distortion of the market for El Paso stock. Schreiber also alleged that Burlington violated § 14(e) by failing in the January offer to disclose the "golden parachutes" offered to four of El Paso's managers. She claims that this January nondisclosure was a deceptive act forbidden by § 14(e).

The District Court dismissed the suit for failure to state a claim. 568 F. Supp. 197 (Del. 1983). The District Court reasoned that the alleged manipulation did not involve a misrepresentation, and so did not violate § 14(e). The District Court relied on the fact that in cases involving alleged violations of § 10(b) of the Securities Exchange Act, 15 U. S. C. § 78j(b), this Court has required misrepresentation for there to be a "manipulative" violation of the section. 568 F. Supp., at 202.

The Court of Appeals for the Third Circuit affirmed. 731 F. 2d 163 (1984). The Court of Appeals held that the acts

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been amended "to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have been diminished or curtailed by the Company in any material respect."

alleged did not violate the Williams Act, because "§ 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers." *Id.*, at 165. The Court of Appeals reasoned that § 14(e) was "enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer." *Id.*, at 165–166. It concluded that the "arguable breach of contract" alleged by petitioner was not a "manipulative act" under § 14(e).

We granted certiorari to resolve the conflict,[3] 469 U. S. 815 (1984). We affirm.

II

A

We are asked in this case to interpret § 14(e) of the Securities Exchange Act, 82 Stat. 457, as amended, 15 U. S. C. § 78n(e). The starting point is the language of the statute. Section 14(e) provides:

> "It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or

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[3] The Court of Appeals for the Sixth Circuit has held that manipulation does not always require an element of misrepresentation or nondisclosure. *Mobil Corp.* v. *Marathon Oil Co.*, 669 F. 2d 366 (1981), cert. denied, 455 U. S. 982 (1982). The Court of Appeals for the Second and Eighth Circuits have applied an analysis consistent with the one we apply today. *Feldbaum* v. *Avon Products, Inc.*, 741 F. 2d 234 (CA8 1984); *Buffalo Forge Co.* v. *Ogden Corp.*, 717 F. 2d 757 (CA2), cert. denied, 464 U. S. 1018 (1983); *Data Probe Acquisition Corp.* v. *Datatab, Inc.*, 722 F. 2d 1 (CA2 1983), cert. denied, 465 U. S. 1052 (1984).

invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."

Petitioner relies on a construction of the phrase, "fraudulent, deceptive, or manipulative acts or practices." Petitioner reads the phrase "fraudulent, deceptive, or manipulative acts or practices" to include acts which, although fully disclosed, "artificially" affect the price of the takeover target's stock. Petitioner's interpretation relies on the belief that § 14(e) is directed at purposes broader than providing full and true information to investors.

Petitioner's reading of the term "manipulative" conflicts with the normal meaning of the term. We have held in the context of an alleged violation of § 10(b) of the Securities Exchange Act:

> "Use of the word 'manipulative' is especially significant. It is and was virtually a term of art when used in connection with the securities markets. It connotes intentional or willful conduct *designed to deceive or defraud* investors by controlling or artificially affecting the price of securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 199 (1976) (emphasis added).

Other cases interpreting the term reflect its use as a general term comprising a range of misleading practices:

> "The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity. . . . Section 10(b)'s general prohibition of practices deemed by the SEC to be 'manipulative'—in this technical sense of artificially affecting market activity in order to mislead investors—is fully consistent with the fundamental purpose of the 1934 Act '"to substitute

> a philosophy of full disclosure for the philosophy of *caveat emptor* . . . .'" . . . Indeed, nondisclosure is usually essential to the success of a manipulative scheme. . . . No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices. But we do not think it would have chosen this 'term of art' if it had meant to bring within the scope of § 10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 476–477 (1977).

The meaning the Court has given the term "manipulative" is consistent with the use of the term at common law,[4] and with its traditional dictionary definition.[5]

She argues, however, that the term "manipulative" takes on a meaning in § 14(e) that is different from the meaning it has in § 10(b). Petitioner claims that the use of the disjunctive "or" in § 14(e) implies that acts need not be deceptive or fraudulent to be manipulative. But Congress used the phrase "manipulative or deceptive" in § 10(b) as well, and we have interpreted "manipulative" in that context to require

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[4] See generally L. Loss, Securities Regulation 984–989 (3d ed. 1983). For example, the seminal English case of *Scott* v. *Brown, Doering, McNab & Co.*, [1892] 2 Q. B. 724 (C. A.), which broke new ground in recognizing that manipulation could occur without the dissemination of false statements, nonetheless placed emphasis on the presence of deception. As Lord Lopes stated in that case, "I can see no substantial distinction between false rumours and false and fictitious acts." *Id.*, at 730. See also *United States* v. *Brown*, 5 F. Supp. 81, 85 (SDNY 1933) ("[E]ven a speculator is entitled not to have any present fact involving the subject matter of his speculative purchase or the price thereof misrepresented by word or act").

[5] See Webster's Third New International Dictionary 1376 (1971) (Manipulation is "management with use of unfair, scheming, or underhanded methods").

misrepresentation.[6] Moreover, it is a "'familiar principle of statutory construction that words grouped in a list should be given related meaning.'" *Securities Industry Assn.* v. *Board of Governors, FRS*, 468 U. S. 207, 218 (1984). All three species of misconduct, *i. e.*, "fraudulent, deceptive, or manipulative," listed by Congress are directed at failures to disclose. The use of the term "manipulative" provides emphasis and guidance to those who must determine which types of acts are reached by the statute; it does not suggest a deviation from the section's facial and primary concern with disclosure or congressional concern with disclosure which is the core of the Act.

B

Our conclusion that "manipulative" acts under § 14(e) require misrepresentation or nondisclosure is buttressed by the purpose and legislative history of the provision. Section 14(e) was originally added to the Securities Exchange Act as part of the Williams Act, 82 Stat. 457. "The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information." *Rondeau* v. *Mosinee Paper Corp.*, 422 U. S. 49, 58 (1975).[7]

It is clear that Congress relied primarily on disclosure to implement the purpose of the Williams Act. Senator Williams, the bill's Senate sponsor, stated in the debate:

> "Today, the public shareholder in deciding whether to accept or reject a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma

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[6] *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 476–477 (1977); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 43 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 199 (1976).

[7] For a more thorough discussion of the legislative history of the Williams Act, see *Piper* v. *Chris-Craft Industries, Inc.*, *supra*, at 24–37.

> which our securities laws are designed to prevent." 113 Cong. Rec. 24664 (1967).

The expressed legislative intent was to preserve a neutral setting in which the contenders could fully present their arguments.[8] The Senate sponsor went on to say:

> "We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S. 510 is designed solely to require full and fair disclosure for the benefit of investors. The bill will at the same time provide the offeror and management equal opportunity to present their case." *Ibid.*

To implement this objective, the Williams Act added §§ 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities Exchange Act. Some relate to disclosure; §§ 13(d), 14(d), and 14(f) all add specific registration and disclosure provisions. Others—§§ 13(e) and 14(d)—require or prohibit certain acts so that investors will possess additional time within which to take advantage of the disclosed information.[9]

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[8] The process through which Congress developed the Williams Act also suggests a calculated reliance on disclosure, rather than court-imposed principles of "fairness" or "artificiality," as the preferred method of market regulation. For example, as the bill progressed through hearings, both Houses of Congress became concerned that corporate stock repurchases could be used to distort the market for corporate control. Congress addressed this problem with § 13(e), which imposes specific disclosure duties on corporations purchasing stock and grants broad regulatory power to the Securities and Exchange Commission to regulate such repurchases. Congress stopped short, however, of imposing specific substantive requirements forbidding corporations to trade in their own stock for the purpose of maintaining its price. The specific regulatory scheme set forth in § 13(e) would be unnecessary if Congress at the same time had endowed the term "manipulative" in § 14(e) with broad substantive significance.

[9] Section 13(d) requires those acquiring a certain threshold percentage of a company's stock to file reports disclosing such information as the purchaser's background and identity, the source of the funds to be used in making the purchase, the purpose of the purchase, and the extent of

Section 14(e) adds a "broad antifraud prohibition," *Piper* v. *Chris-Craft Industries, Inc.*, 430 U. S. 1, 24 (1977), modeled on the antifraud provisions of § 10(b) of the Act and Rule 10b–5, 17 CFR § 240.10b–5 (1984).[10] It supplements the

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the purchaser's holdings in the target company. 15 U. S. C. § 78m(d). Section 13(e) imposes restrictions on certain repurchases of stock by corporate issuers. 15 U. S. C. § 78m(e). Section 14(d) imposes specific disclosure requirements on those making a tender offer. 15 U. S. C. § 78n(d)(1). Section 14(d) also imposes specific substantive requirements on those making a tender offer. These requirements include allowing shareholders to withdraw tendered shares at certain times during the bidding process, 15 U. S. C. § 78n(d)(5), the proration of share purchases when the number of shares tendered exceeds the number of shares sought, 15 U. S. C. § 78n(d)(6), and the payment of the same price to all those whose shares are purchased, 15 U. S. C. § 78n(d)(7). Section 14(f) imposes disclosure requirements when new corporate directors are chosen as the result of a tender offer.

[10] Section 10(b) provides:

"It shall be unlawful for any person, directly or indirectly, . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U. S. C. § 78j(b).

Rule 10b–5 provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security." 17 CFR § 240.10b–5 (1984).

Because of the textual similarities, it is often assumed that § 14(e) was modeled on § 10(b) and Rule 10b–5. See, *e. g.*, *Panter* v. *Marshall Field & Co.*, 646 F. 2d 271, 283 (CA7), cert. denied, 454 U. S. 1092 (1981). For the purpose of interpreting the term "manipulative," the most significant changes from the language of § 10(b) were the addition of the term "fraudu-

more precise disclosure provisions found elsewhere in the Williams Act, while requiring disclosure more explicitly addressed to the tender offer context than that required by § 10(b).

While legislative history specifically concerning § 14(e) is sparse, the House and Senate Reports discuss the role of § 14(e). Describing § 14(e) as regulating "fraudulent transactions," and stating the thrust of the section:

> "This provision would affirm the fact that persons engaged in making or opposing tender offers or otherwise seeking to influence the decision of investors or the outcome of the tender offer are under an obligation to make *full disclosure* of material information to those with whom they deal." H. R. Rep. No. 1711, 90th Cong., 2d Sess., 11 (1968) (emphasis added); S. Rep. No. 550, 90th Cong., 1st Sess., 11 (1967) (emphasis added).

Nowhere in the legislative history is there the slightest suggestion that § 14(e) serves any purpose other than disclosure,[11] or that the term "manipulative" should be read as an

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lent," and the reference to "acts" rather than "devices." Neither change bears in any obvious way on the meaning to be given to "manipulative."

Similar terminology is also found in § 15(c) of the Securities Exchange Act, 15 U. S. C. § 78*o*(c), § 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a), and § 206 of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–6.

[11] The Act was amended in 1970, and Congress added to § 14(e) the sentence, "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Petitioner argues that this phrase would be pointless if § 14(e) was concerned with disclosure only.

We disagree. In adding the 1970 amendment, Congress simply provided a mechanism for defining and guarding against those acts and practices which involve material misrepresentation or nondisclosure. The amendment gives the Securities and Exchange Commission latitude to regulate nondeceptive activities as a "reasonably designed" means of preventing manipulative acts, without suggesting any change in the meaning of the term "manipulative" itself.

invitation to the courts to oversee the substantive fairness of tender offers; the quality of any offer is a matter for the marketplace.

To adopt the reading of the term "manipulative" urged by petitioner would not only be unwarranted in light of the legislative purpose but would be at odds with it. Inviting judges to read the term "manipulative" with their own sense of what constitutes "unfair" or "artificial" conduct would inject uncertainty into the tender offer process. An essential piece of information—whether the court would deem the fully disclosed actions of one side or the other to be "manipulative"—would not be available until after the tender offer had closed. This uncertainty would directly contradict the expressed congressional desire to give investors full information.

Congress' consistent emphasis on disclosure persuades us that it intended takeover contests to be addressed to shareholders. In pursuit of this goal, Congress, consistent with the core mechanism of the Securities Exchange Act, created sweeping disclosure requirements and narrow substantive safeguards. The same Congress that placed such emphasis on shareholder choice would not at the same time have required judges to oversee tender offers for substantive fairness. It is even less likely that a Congress implementing that intention would express it only through the use of a single word placed in the middle of a provision otherwise devoted to disclosure.

C

We hold that the term "manipulative" as used in § 14(e) requires misrepresentation or nondisclosure. It connotes "conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." *Ernst & Ernst* v. *Hochfelder*, 425 U. S., at 199. Without misrepresentation or nondisclosure, § 14(e) has not been violated.

Applying that definition to this case, we hold that the actions of respondents were not manipulative. The amended complaint fails to allege that the cancellation of the first

tender offer was accompanied by any misrepresentation, nondisclosure, or deception. The District Court correctly found: "All activity of the defendants that could have conceivably affected the price of El Paso shares was done openly." 568 F. Supp., at 203.

Petitioner also alleges that El Paso management and Burlington entered into certain undisclosed and deceptive agreements during the making of the second tender offer. The substance of the allegations is that, in return for certain undisclosed benefits, El Paso managers agreed to support the second tender offer. But both courts noted that petitioner's complaint seeks only redress for injuries related to the cancellation of the first tender offer. Since the deceptive and misleading acts alleged by petitioner all occurred with reference to the making of the second tender offer—when the injuries suffered by petitioner had already been sustained—these acts bear no possible causal relationship to petitioner's alleged injuries. The Court of Appeals dealt correctly with this claim.

III

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

WILLIAMS ET AL. *v.* VERMONT ET AL.

APPEAL FROM THE SUPREME COURT OF VERMONT

No. 84–592. Argued March 19, 1985—Decided June 4, 1985

Vermont collects a use tax when cars are registered with it, but the tax is not imposed if the car was purchased in Vermont and a sales tax has been paid. The tax is also reduced by the amount of any sales or use tax paid to another State if that State would afford a credit for taxes paid to Vermont in similar circumstances. The credit is available, however, only if the registrant was a Vermont resident at the time he paid the taxes. Appellants, who bought and registered cars outside of Vermont before becoming Vermont residents, were required to pay the full use tax in order to register their cars in Vermont. In proceedings in the Vermont Superior Court, appellants alleged that Vermont's failure to afford them credit for the out-of-state sales taxes they had paid violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment because the credit was provided in the case of vehicles acquired outside the State by Vermont residents. Rejecting appellants' contention, the court dismissed the complaint. The Vermont Supreme Court affirmed by citation to another decision handed down the same day, *Leverson* v. *Conway*, 144 Vt. 523, 481 A. 2d 1029, in which it rejected a similar equal protection challenge to the tax credit, concluding that the Vermont statute was rationally related to the legitimate state interest in raising revenue to maintain and improve the highways, and rationally placed the burden on those who used them.

Held: When the Vermont statute is viewed on its face, appellants have stated a claim of discrimination prohibited by the Equal Protection Clause. Pp. 18–28.

(a) While the State asserts that the tax credit applies only to Vermont residents who register their cars in Vermont without first having registered them elsewhere, and that a resident who purchases, pays a sales or use tax on, and registers a car in another State must also pay the Vermont use tax upon his return, it does not appear that the Vermont Supreme Court, in ruling on the equal protection claim in *Leverson*, *supra*, construed the exemption in such a manner. Instead, every indication is that a Vermont resident enjoys a credit for any sales taxes paid to a reciprocating State, even if he registered and used the car there before registering it in Vermont. Pp. 18–21.

(b) An exemption such as that challenged here will be sustained if the legislature could have reasonably concluded that the challenged classifi-

cation would promote a legitimate state purpose. No legitimate purpose is furthered by the discriminatory exemption here. Residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants—at least among those who used their cars elsewhere before coming to Vermont. The distinction between them bears no relation to the statutory purpose of raising revenue for the maintenance and improvement of Vermont roads. The customary rationale for a use tax—relating to protecting local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices—has no application to purchases made out-of-state by those who were not residents of the taxing State at the time of purchase. Nor can the distinction here be justified by a state policy of making those who use the highways contribute to their maintenance and improvement, or as encouraging interstate commerce by enabling Vermont residents, faced with limited automobile offerings at home, to shop outside the State without penalty. Pp. 21–27.

144 Vt. 649, 478 A. 2d 993, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 28. BLACKMUN, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 28. POWELL, J., took no part in the decision of the case.

Norman Williams argued the cause *pro se* and filed briefs for appellants.

Andrew M. Eschen, Assistant Attorney General of Vermont, argued the cause for appellees. With him on the brief was *Jeffrey L. Amestoy*, Attorney General.

JUSTICE WHITE delivered the opinion of the Court.

The State of Vermont collects a use tax when cars are registered with it. The tax is not imposed if the car was purchased in Vermont and a sales tax has been paid. The tax is also reduced by the amount of any sales or use tax paid to another State if that State would afford a credit for taxes paid to Vermont in similar circumstances. The credit is available, however, only if the registrant was a Vermont resident at the time he paid the taxes. Appellants, who bought cars outside of Vermont before becoming residents of that State, challenge the failure to grant them a similar

credit. We agree that this failure denies them the equal protection of the laws.

I

Appellants' complaint, which was dismissed before an answer was filed, sets out the following facts. In December 1980, appellant Norman Williams purchased a new car in Illinois, paying a five-percent sales tax. Three months later, he moved to Vermont, bringing the car with him. He subsequently attempted to register the car in Vermont without paying the required use tax. The Vermont Department of Motor Vehicles refused to register the car. Williams responded by suing in the Federal District Court for the District of Vermont, which, relying on 28 U. S. C. § 1341, dismissed his complaint. Williams then paid the tax, which came to $172, unsuccessfully sought a refund from the Department of Motor Vehicles, and filed the present suit in Vermont Superior Court.[1]

The complaint alleged a number of constitutional defects in the State's failure to afford appellants credit for the sales taxes they had paid. One of them was that the Equal Protection Clause of the Fourteenth Amendment forbade the State to deny the credit to them while providing it in the case of vehicles "acquired outside the state by a resident of Vermont." Vt. Stat. Ann., Tit. 32, § 8911(9) (1981).

The Superior Court dismissed the complaint. Acknowledging that the use tax "does not afford, on its face, equal treatment to residents and nonresidents who purchase cars out-of-state," App. 14, the court considered the relevant inquiry to be "whether discrimination occurs within the state," *id.*, at 15. It saw no such discrimination, reasoning that in

[1] Appellant Susan Levine moved to Vermont in 1979. She brought with her a car she had purchased in New York a year before on which she had paid a seven-percent state sales tax. Upon registering her car in Vermont in 1982, she paid a use tax of $110. She then successfully moved to intervene in Williams' suit.

practice Vermont residents always pay the use tax, because reciprocal States excuse payment of the sales tax and therefore there is no out-of-state payment to credit the use tax against. The court also found no burden on the right to travel, no violation of the Privileges and Immunities Clause, and no interference with interstate commerce.

The Vermont Supreme Court affirmed, 144 Vt. 649, 478 A. 2d 993 (1984), by citation to another decision handed down the same day, *Leverson* v. *Conway*, 144 Vt. 523, 481 A. 2d 1029, appeal dism'd for want of a substantial federal question, 469 U. S. 926 (1984), pet. for rehearing pending, No. 84–315. *Leverson* was an essentially identical case brought by a former Wisconsin resident who, like appellants, had purchased a car in his home State and paid a sales tax, then moved to Vermont and been obliged to pay the use tax. The Vermont Supreme Court upheld the tax. First, it rejected the argument that denying a credit for a sales tax paid to another State infringed the right to travel. The use tax did not impose a penalty for moving to Vermont—the obligation was incurred only by registering one's car there. Absent such a penalty, and given that there is no fundamental right to have or to register a car, the Equal Protection Clause required only minimal scrutiny. The statute was rationally related to the legitimate state interest in raising revenue to maintain and improve the highways, and rationally placed the burden on those who used them. The exemption for residents who purchased cars in reciprocal States encouraged purchases within Vermont by residents of those States. This goal would not be furthered by granting an exemption to new residents who have already purchased cars elsewhere. The court went on to hold that the Privileges and Immunities Clause did not come into play because no right, such as the right to travel, qualifying as a privilege or immunity was involved. It also rejected a Commerce Clause challenge, viewing this as a straightforward use tax, imposed only on goods that had come to rest in Vermont.

The Vermont Supreme Court denied rehearing, and appellants brought this appeal. We noted probable jurisdiction, 469 U. S. 1085 (1984), and we now reverse.

II

The Vermont Motor Vehicle Purchase and Use Tax, Vt. Stat. Ann., Tit. 32, ch. 219 (1981), is distinct from the State's general sales and use taxes.[2] It is intended to "improve and maintain the state and interstate highway systems, to pay the principal and interest on bonds issued for the improvement and maintenance of those systems and to pay the cost of administering this chapter." § 8901. The revenue from the tax goes into a distinct "transportation fund." § 8912. The tax is of two sorts: a four-percent sales tax is imposed at the time of purchase of a motor vehicle in Vermont by a Vermont resident, § 8903(a), and a four-percent use tax is imposed upon registration of a motor vehicle in Vermont unless the Vermont sales tax was paid, § 8903(b).[3] A number of vehicles are exempt, including, for example, those owned by a State, the United States, or charitable institutions, and those transferred within a family. See generally § 8911. Prior to September 1, 1980, the statute also exempted "pleasure cars, the owners of which were not residents of this State at the time of purchase and had registered and used the vehicle for at least thirty days in a state or province other than Vermont." Vt. Stat. Ann., Tit. 32, § 8911(6) (1970 and Supp. 1981) (repealed). That provision would have exempted

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[2] The general sales and use tax provisions are found in Vt. Stat. Ann., Tit. 32, ch. 233 (1981). The present controversy could not have arisen under these provisions. Vermont's ordinary use tax applies neither to "property purchased by the user while a nonresident of this State," § 9744(a)(2), nor to any property to the extent the user has already paid a sales or use tax to a State with a reciprocal agreement, § 9744(a)(3). Appellants would be exempt under both these subsections.

[3] Both taxes have a ceiling of $600. The sales tax is paid on the purchase price. §§ 8902(4), (5) (1981), § 8903(a) (Supp. 1984). The use tax is paid on the car's low book value at the time of registration. App. 15; § 8907.

appellants from the use tax. Since its repeal, registrants who purchased their cars out-of-state when not Vermont residents have had to pay the use tax, regardless of whether they already paid a sales tax in another jurisdiction on the same car.

One other exemption is critical to this case. Section 8911(9) provides that the tax does not apply to

> "pleasure cars acquired outside the state by a resident of Vermont on which a state sales or use tax has been paid by the person applying for a registration in Vermont, providing that the state or province collecting such tax would grant the same pro-rata credit for Vermont tax paid under similar circumstances. If the tax paid in another state is less than the Vermont tax the tax due shall be the difference."

There is some dispute as to the reach of this provision. Appellants assert that, in light of this provision, had they been residents when they purchased their cars, they would now be exempt from the use tax. The State disagrees, asserting that the exemption applies only to Vermont residents who register their cars in Vermont without first having registered them elsewhere. According to it, a resident who purchases, pays a sales or use tax on, and registers a car in another State must also pay the Vermont use tax upon his return, bearing the same obligation as appellants.

The State's submission, if it is to be accepted, would negate any claim that appellants were treated differently than Vermont residents in similar circumstances.[4] For several rea-

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[4] If the statute operated as the State says it does, it might still be discriminatory, at least in theory. A nonresident who buys his car in another State, pays a sales tax, but does not register it there, and brings it right to Vermont, would pay two taxes, whereas a Vermont resident doing the same thing would pay only one. But this is not a distinction that appellants could challenge. Since they registered their cars out-of-state, they would not qualify for the exemption, but neither would a resident who had done the same.

sons, however, we do not believe that in ruling on the equal protection claim the Vermont Supreme Court construed the exemption in this manner.[5] The exemption contained in § 8911(9) refers to "pleasure cars acquired outside the state by a resident of Vermont." That language on its face exempts Vermont residents who register in another State, and in *Leverson* the Vermont Supreme Court appears to have proceeded on this basis. That court set out a comprehensive list of who must pay the tax, from which the Vermont resident who first registers the car in another State is conspicuously absent. 144 Vt., at 532, 481 A. 2d, at 1034. The opinion also several times points out that residents who pay a tax in a nonreciprocal State do not enjoy the credit upon registering their cars in Vermont. *Id.*, at 532, 533, 481 A. 2d, at 1034, 1035. Had the court believed that those purchasing and registering a car in a reciprocal State are also not exempt, one would have expected it to have said so. Similarly, the court noted that someone in appellants' position "is treated in exactly the same manner as all nonexempt persons, including the resident who purchases his vehicle in a nonreciprocal state." *Id.*, at 533, 481 A. 2d, at 1035. If the court had understood the statute as do appellees, it would also have noted that appellants were treated just like any resident who had previously registered a car elsewhere, not just one who purchased in a nonreciprocal State.

More fundamentally, had the Vermont Supreme Court accepted the narrow construction of the exemption that the State urges, it surely would have stated that the new resident suffers no unequal treatment under the statute at all and would have found no necessity to justify any discriminatory impact of the tax. This would have been a simple and straightforward answer to the equal protection claim, and

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[5] The State put forward this reading of the statute in its briefs in this case and in *Leverson*. See Brief for Appellees in No. 83–139 (Vt. Sup. Ct.), pp. 18–19, and n. 2; Brief for Appellee in No. 83–157 (Vt. Sup. Ct.), pp. 17–18, and n. 3.

there would have been no occasion to address the level of scrutiny to be applied to the discrimination or to identify the State's interest in imposing the differential treatment of the nonresident. Instead, the court concluded that the State need have only a rational basis for the discrimination, and proceeded to hold that there was adequate justification for not extending the exemption to nonresidents.[6]

In short, every indication is that a Vermont resident who, like appellants, bought a car in another State, paid a sales or use tax, and used the car there for a period of time before coming to Vermont, would receive the credit. Appellees offer only their own say-so to the contrary. See Tr. of Oral Arg. 39. Pointing to nothing in the statute or in the opinion below to support their narrow reading, they would have us essentially add a clause that is not there. We cannot do so without stronger authority. We therefore proceed on the understanding that a Vermonter enjoys a credit for any sales taxes paid to a reciprocating State, even if he registered and used the car there before registering the car in Vermont.

III

This Court has expressly reserved the question whether a State must credit a sales tax paid to another State against its

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[6] The dissent suggests that this reading is not consistent with the statutory language. *Post*, at 32–33, and n. 3. While it is not our business to interpret state statutes, there is no necessary inconsistency. The literal language applies whenever a Vermonter buys a car in another State, regardless of how quickly he returns to Vermont. Significantly, the tax from which § 8911(9) exempts Vermont residents is imposed "at the time of first registering *or transferring a registration.*" § 8903(b) (emphasis added); see also § 8905(b). In addition, the credit applies when a "state sales *or use* tax has been paid." § 8911(9) (emphasis added). If it extended only to the Vermont resident who bought a car elsewhere and brought it straight to Vermont, the reference to a use tax would be meaningless. Finally, as the dissent itself notes, *post*, at 36, n. 5, if the credit only applied in these circumstances, the provision would be essentially superfluous. We should not assume the legislature passed a statute without effect.

own use tax. *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 172 (1939); *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587 (1937). The District of Columbia and all but three States with sales and use taxes do provide such a credit, although reciprocity may be required. CCH, State Tax Guide 6013 (1984). As noted above, see n. 2, *supra*, Vermont provides a credit with regard to its general use tax. Such a requirement has been endorsed by at least one state court, *Montgomery Ward & Co.* v. *State Board of Equalization*, 272 Cal. App. 2d 728, 78 Cal. Rptr. 373 (1969), cert. denied, 396 U. S. 1040 (1970), was advocated 20 years ago in the much-cited Report of the Willis Subcommittee, H. R. Rep. No. 565, 89th Cong., 1st Sess., 1136, 1177–1178 (1965), is adopted in the Multistate Tax Compact, Art. V, § 1, and has significant support in the commentary, *e. g.*, J. Hellerstein & W. Hellerstein, State and Local Taxation 637–638 (1978); Developments in the Law: Federal Limits on State Taxation of Interstate Business, 75 Harv. L. Rev. 953, 999–1000 (1962). Appellants urge us to hold that it is a constitutional requirement. Brief for Appellants 31–35. Once again, however, we find it unnecessary to reach this question. Whatever the general rule may be, to provide a credit only to those who were residents at the time they paid the sales tax to another State is an arbitrary distinction that violates the Equal Protection Clause.

This Court has many times pointed out that in structuring internal taxation schemes "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973). It has been reluctant to interfere with legislative policy decisions in this area. See *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 547–548 (1983); *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 40–41 (1973); *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 526–527 (1959). An exemption such as that chal-

lenged here "will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." *Exxon Corp.* v. *Eagerton*, 462 U. S. 176, 196 (1983). See generally *Schweiker* v. *Wilson*, 450 U. S. 221, 234–235 (1981).

We perceive no legitimate purpose, however, that is furthered by this discriminatory exemption. As we said in holding that the use tax base cannot be broader than the sales tax base, "equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state." *Halliburton Oil Well Co.* v. *Reily*, 373 U. S. 64, 70 (1963).[7] A State may not treat those within its borders unequally solely on the basis of their different residences or States of incorporation. *WHYY* v. *Glassboro*, 393 U. S. 117, 119 (1968); *Wheeling Steel Corp.* v. *Glander*, 337 U. S. 562, 571–572 (1949). In the present case, residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants—at least among those who used their cars elsewhere before coming to Vermont.[8] Having registered a car in Vermont they are similarly situated for all relevant purposes. Each is a Vermont resident, using a car in Vermont, with an equal obligation to pay for

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[7] *Halliburton* was decided under the Commerce Clause and is not dispositive. We do not consider in what way, if any, the failure to give appellants a credit might burden interstate commerce. The critical point is the Court's emphasis on the need for equal treatment of taxpayers who can be distinguished only on the basis of residence. See also *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 583–584 (1937).

[8] The dissent does not disagree that such people are similarly situated, nor does it identify any justification for preferential treatment of the resident. *Post*, at 32–34. It merely argues that the inequity is the acceptable result of the imprecision of a generally rational classification. *Post*, at 33–35. Under rational-basis scrutiny, legislative classifications are of course allowed some play in the joints. But the choice of a proxy criterion—here, residence for State of use—cannot be so casual as this, particularly when a more precise and direct classification is easily drawn.

the maintenance and improvement of Vermont's roads. The purposes of the statute would be identically served, and with an identical burden, by taxing each. The distinction between them bears no relation to the statutory purpose. See *Zobel* v. *Williams*, 457 U. S. 55, 61 (1982); cf. *Texaco, Inc.* v. *Short*, 454 U. S. 516, 540 (1982). As the Court said in *Wheeling*, appellants have not been "accorded equal treatment, and the inequality is not because of the slightest difference in [Vermont's] relation to the decisive transaction, but solely because of the[ir] different residence." 337 U. S., at 572.

In some ways, this is not a typical sales and use tax scheme. The proceeds go to a transportation fund rather than to general revenue. Perhaps as a result, the sales tax is narrower than most, in that it applies not to all sales within the jurisdiction, but only to those to residents. Conversely, the use tax is broader than most, in that it applies to items purchased by nonresidents and taxed by other States. As noted, the general sales and use tax provisions of Vermont, for example, have neither of these features. See n. 2, *supra*.

Applied to those such as appellants, the use tax exceeds the usual justifications for such a tax. A use tax is generally perceived as a necessary complement to the sales tax, designed to "'protect a state's revenues by taking away the advantages to residents of traveling out of state to make untaxed purchases, and to protect local merchants from out-of-state competition which, because of its lower or nonexistent tax burdens, can offer lower prices.'" *Leverson*, 144 Vt., at 527, 481 A. 2d, at 1032, quoting *Rowe-Genereux, Inc.* v. *Department of Taxes*, 138 Vt. 130, 133–134, 411 A. 2d 1345, 1347 (1980); see *Henneford* v. *Silas Mason Co.*, *supra*, at 581. This customary rationale for the use tax has no application to purchases made out-of-state by those who were not residents of the taxing State at the time of purchase. These home-state transactions cannot be seen as lost

Vermont sales, and are certainly not ones lost as a result of Vermont's sales tax. Imposing a use tax on them in no way protects local business. In short, in its structure, this sales and use tax combination is exactly the opposite of the customary provisions: there is no disincentive to the Vermont resident's purchasing outside the State, and there is a penalty on those who bought out-of-state but could not have been expected to do otherwise. The first provision limits local commerce, the second does not help it.

Despite *Leverson*'s passing reference to the standard rationale for use taxes, then, the only plausible justification for imposing the tax on those in appellants' position in the first place—apart from the simple desire to raise funds—is the principle that those using the roads should pay for them. In *Leverson*, the Vermont Supreme Court supported the tax by reference to "Vermont's basic policy" of making those who use the highways contribute to their maintenance and improvement. 144 Vt., at 532, 481 A. 2d, at 1034.[9] Yet this does not explain the exemption for a resident who bought a car elsewhere and paid a tax to another State, which, as the dissent points out, *post*, at 32–33, is "directly contrary" to the user-pays principle. This "basic policy" arguably supports

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[9] A nonrecurring use tax pegged to the value of the car is an exceedingly loosely tailored means to this end. The amount of such a payment has no relation to the extent of use, includes the irrelevant variable of the luxury value of the car, and fails to account for the possibility of the owner moving out of the State or selling the car during its useful life. Reliance on annual registration fees would provide a more accurate measure of current use and would seem to be more closely related to the stated purpose. However, appellants do not challenge the tax itself as an equal protection violation. And despite the looseness of the fit, we would be hard pressed to say that this manner of funding highway maintenance and construction is irrational. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).

imposition of the use tax on appellants, and the denial of a credit to them; but it provides no rational reason to spare Vermont residents an equal burden. The same response applies to the Vermont court's statement that to allow an exemption for people in appellants' position, or for Vermonters who purchase in nonreciprocal States, "would run counter to the state's present policies of requiring user contributions and encouraging purchases within the state, and would result in the loss of tax revenues to the state." 144 Vt., at 533, 481 A. 2d, at 1035. This is no less true with regard to the Vermonter who purchases a car in a reciprocal State. Granting the resident a credit for sales tax paid to the other State is similarly "counter to the state's policies of requiring user contributions and encouraging purchases within the state." *Ibid.*

The *Leverson* court's primary explanation of the exemption was that it

> "appears to be based upon a policy of encouraging out-of-staters from reciprocal states to purchase their vehicles in Vermont and pay a sales tax to Vermont, secure in the knowledge that they will not be subject to a duplicate tax in their home states, and upon a legislative assumption that few, if any, tax dollars will be lost through this exercise in comity." *Id.*, at 532, 481 A. 2d, at 1034–1035.

However, the exemption cannot be justified as an indirect means of encouraging out-of-staters to purchase in Vermont and pay Vermont sales tax, for the straightforward reason that Vermont does not impose its sales tax on nonresidents. § 8903(a).

Appellees take a different tack, suggesting that the exemption is designed to encourage interstate commerce by enabling Vermont residents, faced with limited automobile offerings at home, Tr. of Oral Arg. 35–36, to shop outside the State without penalty. Brief for Appellees 7. This justification may sound plausible, but it fails to support the classification at issue. Those in appellants' position pay exactly the

penalty for purchasing out-of-state that Vermont spares its own residents. The credit may rationally further Vermont's legitimate interest in facilitating Vermonters' out-of-state purchases, but this interest does not extend to the facilitation of Vermonters' out-of-state use. Vermont may choose not to penalize old residents who used their cars in other States, but it cannot extend that benefit to old residents and deny it to new ones. The fact that it may be rational or beneficent to spare some the burden of double taxation does not mean that the beneficence can be distributed arbitrarily.

Finally, the Vermont court pointed out that Leverson was "treated in exactly the same manner as all nonexempt persons, including the resident who purchases his vehicle in a nonreciprocal state." 144 Vt., at 533, 481 A. 2d, at 1035. Yet the fact that all those not benefited by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes." *Rinaldi* v. *Yeager*, 384 U. S. 305, 308 (1966).

In sum, we can see no relevant difference between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere. To free one group and not the other from the otherwise applicable tax burden violates the Equal Protection Clause.

IV

Our holding is quite narrow, and we conclude by emphasizing what we do not decide. We need not consider appellants' various arguments based on the right to travel, the Privileges and Immunities Clause, and the Commerce Clause.

We again put to one side the question whether a State must in all circumstances credit sales or use taxes paid to another State against its own use tax. In addition, we note that this action was dismissed for failure to state a claim before an answer was filed. The "dominant theme running through all state taxation cases" is the "concern with the actuality of operation." *Halliburton*, 373 U. S., at 69. It is conceivable that, were a full record developed, it would turn out that in practice the statute does not operate in a discriminatory fashion. Finally, in light of the fact that the action was dismissed on the pleadings, and given the possible relevance of state law, see *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 277 (1984), we express no opinion as to the appropriate remedy.

We hold only that, when the statute is viewed on its face, appellants have stated a claim of unconstitutional discrimination. The decision below is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, concurring.

I join the Court's opinion for the reasons stated therein and in my concurring opinion in *Zobel* v. *Williams*, 457 U. S. 55, 65 (1982). General application of distinctions of the kind made by the Vermont statute would clearly, though indirectly, threaten the "federal interest in free interstate migration." *Id.*, at 66. In addition, the statute makes distinctions among residents that are not "supported by a valid state interest independent of the discrimination itself." *Id.*, at 70.

JUSTICE BLACKMUN, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

The Court in this case draws into question the constitutionality of a statute that was not intended to discriminate

against anyone, does not discriminate against appellants, and, for all that appears, never has been applied in a discriminatory fashion against anyone else. Nevertheless, the Court has imagined a fanciful hypothetical discrimination, and then has threatened that the statute will violate equal protection unless the Vermont Supreme Court or the Vermont Legislature rejects the Court's conjecture.

As the Court recognizes, Vermont's use tax is designed to help defray the State's cost for building and maintaining its roads. Generally speaking, if one purchases an automobile in Vermont, one pays a sales tax on the purchase. If one purchases a car elsewhere but registers it in Vermont, the use tax is assessed. The end result is that likely users of the State's roads are assessed a tax for their use. The overlapping series of credits and exemptions built into this vehicle tax system are designed to resolve a number of less common cases that fall outside the typical pattern of a Vermonter's purchase of a car either in Vermont or elsewhere. However complex and redundant, the exceptions and credits accomplish two related legitimate purposes: they facilitate the flow of interstate commerce by ensuring that residents and nonresidents alike are not penalized for purchasing cars in a foreign State, and they protect against the possibility that someone using the roads primarily in only one State will be forced to pay taxes in two States.

Thus Vermont, along with apparently every other State, will not charge a sales tax to an out-of-state purchaser of an automobile. See Vt. Stat. Ann., Tit. 23, § 463, and Tit. 32, § 8903(a) (Supp. 1984); *J. C. Penney Co.* v. *Hardesty*, 164 W. Va. 525, 538–539, 264 S. E. 2d 604, 613 (1980). This exemption ensures that out-of-state purchasers who do not use Vermont roads except to leave the State will not be made to pay for their use.

The credit at issue in this litigation accomplishes much the same purpose. If a Vermont resident, for whatever reason, *does* pay an out-of-state sales tax, then, when he returns to Vermont with his car, he will be excused from payment of

Vermont's use tax to the extent of the amount paid by way of the sales tax, if the other State provides a reciprocal credit. Again, the credit facilitates the interstate purchase of automobiles, and helps ensure that a car buyer is not paying for the use of two States' roads when using only one.[1]

A

Vermont's tax credit system worked exactly as it was intended to work in the cases of Mr. Williams and Ms. Levine. Each purchased his or her car and used it for a time in another State, and so paid a tax to that State for the use of its roads. When each subsequently moved to Vermont and registered the cars there, he or she paid a second tax for the use of the roads in their new State. Each used his or her car in two States, and each paid two States' use or sales taxes. Thus, appellants are not situated similarly to a Vermont resident who buys his car in Illinois or New York, is exempted from sales taxes there, drives it to Vermont, and pays Vermont's use tax. Such an individual uses a car only in Vermont, and pays only Vermont's use tax. As the Superior Court most appropriately found, any difference in treatment between appellants and the typical Vermont out-of-state automobile purchaser "is supported by [appellants'] use of the highways of more than one state." App. 15. Nor would it have furthered the commerce-facilitating purposes of the tax to extend a credit to persons in appellants' situation. Having *already* purchased their cars, they are beyond

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[1] In the rare event that the use-tax credit is used because the out-of-state sales tax for some reason was paid, see n. 5, *infra*, the State that receives the tax will not be the State whose roads are used, but the State where the car was purchased. Because the statute is reciprocal, however, it is hardly irrational to assume that the reciprocal payments will even out. The exemptions, thus, are entirely consistent with the user-pays principle of the tax. And from the point of view of the purchaser, as with these appellants, it matters little to whom he is paying a tax. He is using the car primarily in only one State, and paying a use or sales tax in one State.

the reach of any credit designed to facilitate the purchase of cars across state lines.

Vermont's asserted purposes being concededly legitimate, and the means used to achieve those purposes rational in the abstract and effective in these particular instances, the tax exemption should easily pass the minimal scrutiny this Court routinely applies to tax statutes. See, *e. g.*, *Regan* v. *Taxation with Representation of Washington*, 461 U. S. 540, 547–548 (1983). The Court, however, has subjected Vermont's motor vehicle tax laws to a kind of microscopic scrutiny that few enactments could survive, and has managed, it feels, to find a way in which the statute can be understood to discriminate against appellants. The Court seems to have adopted a new level of scrutiny that is neither minimal nor strict, but strange unto itself. Out there somewhere, the Court imagines, is someone whom Vermont wishes to treat better than it treated Mr. Williams or Ms. Levine.

This phantom beneficiary of Vermont's discrimination is a Vermont resident who leaves the State to purchase an automobile, pays the sales tax and registers the car in the foreign State of purchase, lives there for a while, and then returns to Vermont and registers the car there. This resident is said to be entitled to the exception of Vt. Stat. Ann., Tit. 32, § 8911(9) (1981), while the similarly situated nonresident such as Mr. Williams is not. The phantom's car is said to be entitled to the credit because it is "acquired outside the state by a resident of Vermont" under the terms of the statute.

B

The majority correctly understands that if its hypothetical Vermonter is not entitled to the exception, the discrimination disappears. That being the case, the problem the Court identifies seems to me to be largely of its own making. For the discrimination it finds was neither pleaded in the complaint nor discussed in any opinion of the Vermont courts. The Court rejects the State's submission that the exception

would *not* be applied to this hypothetical Vermonter, has never been applied in that situation, and was not intended to be so applied. It rejects this understanding of the statute because the statute is ambiguously worded, and because the Supreme Court of Vermont in *Leverson* v. *Conway*, 144 Vt. 523, 481 A. 2d 1029, appeal dism'd, 469 U. S. 926 (1984), pet. for rehearing pending, No. 84–315, apparently failed to consider explicitly and accept the State's view of the statute. *Ante*, at 19–21.[2] Thus a statute is placed under a constitutional cloud because a state court failed to go out of its way to reject a hypothetical interpretation of one of the statute's terms. If appellants were in fact concerned about this type of discrimination, they should have made that concern clear in their pleadings, so the Vermont courts could address the issue.

While it is idle to speculate as to how the Vermont Supreme Court will interpret § 8911(9) on remand, it is not inappropriate to observe that there is force in the State's position that in context an equally plausible interpretation of the phrase "acquired outside the state" in § 8911(9) is that the car is purchased outside the State but registered immediately in Vermont. This reading of the statute best comports with the legislative purpose in enacting exceptions to the automobile use tax. Section 8911(9) was designed to prevent people who buy their cars out-of-state but live in Vermont from being doubly taxed. Nothing in the exception/credit scheme suggests that Vermont ever wished to protect a resident who took up temporary residency elsewhere and therefore ultimately used the highways in two States, rather than in just one. Allowing such residents this credit would be directly

[2] In the only nonsummary opinion issued in this case, however, the Vermont Superior Court found that the statute did *not* discriminate:

"The state exacts a use tax upon the value of all cars used *within* the state, regardless of whether they were purchased by residents or nonresidents, and Plaintiffs have failed to demonstrate that they would have been treated any differently had they been Vermont residents when they purchased their cars." App. 15 (emphasis in original).

contrary to the purpose of the tax, which is to have the users of the State's roads pay for the maintainance and improvement of those roads. See Vt. Stat. Ann., Tit. 32, § 8901 (1981). There is also support for this construction of the statute in the language of § 8911 itself.[3] Nor is there any evidence in the legislative history or the administrative practice that supports the Court's contrary reading of the statutory language.

C

Even if the Court is correct in its understanding of § 8911(9), however, the identified discrimination still is created by a classification rationally related to a legitimate governmental purpose sufficient to satisfy the minimal scrutiny the Court routinely applies in similar equal protection challenges to tax provisions. The Court admits that it is a legitimate governmental purpose to assess taxes on people who use roads to provide for their upkeep. The question then becomes whether the identified discrimination worked by § 8911(9) is designed rationally to further this purpose. And I would have thought the answer was not even close.

The reason nonresidents who purchase cars out-of-state are taxed if they subsequently relocate in Vermont, while resident out-of-state purchasers are not, is that it was pre-

[3] When the Vermont Legislature meant to exempt an automobile under § 8911 because of where it was operated or who owned it, it said so. In particular, the State made only one specific allowance for certain residents who purchase and initially register their cars out-of-state. Thus, in § 8911(11) motor vehicles "owned or purchased in another state by a member of the armed forces on full time active duty" are exempted from the use tax. That section would be partially redundant if the Court's interpretation of § 8911(9) were accurate. Other subsections of § 8911 also speak explicitly of cars classified by where they are operated or registered. Thus, the statute exempts cars "owned or registered" by any State, cars "owned and operated by the United States," cars "owned and registered" by religious or charitable groups, cars "owned and operated" by certain dealers, and certain cars "owned and operated by physically handicapped persons." §§ 8911(1), (2), (3), (4), and (12). Only § 8911(9), in contrast, speaks in terms of where a car is "acquired."

sumed that people will use their cars primarily in the States in which they reside. Most people who do not reside in Vermont and do not purchase their cars in that State, will not use their cars primarily in Vermont. If at some time in the future they move to Vermont and register their automobiles there, the assumption is that they will have used their cars in two different States. On the other hand, most people who reside in Vermont and purchase their cars out-of-state will return to Vermont immediately with their cars. Thus, the out-of-state purchaser is taxed, while the Vermont purchaser is exempted to the extent that he already has paid a sales tax. This distinction is hardly irrational, and the fact that there may be a Vermont resident who both purchases and uses his car out-of-state, and is therefore situated similarly to Mr. Williams, surely does not render the scheme irrational. A tax classification does not violate the demands of equal protection simply because it may not perfectly identify the class of people it wishes to single out. A State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 527 (1959).[4]

The Court disagrees, and finds that "residence at the time of purchase is a wholly arbitrary basis on which to distinguish among present Vermont registrants—at least among those who used their cars elsewhere before coming to Vermont." *Ante*, at 23. The Court, however, ignores the purpose of the tax and of the classification. Vermont does not wish to "dis-

[4] "States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U. S. 356, 359 (1973). Were it otherwise, it would be an easy task to ferret out inconsistencies in taxation schemes. After all, even if Vermont's statute were worded in terms of the State of first registration, rather than the State of residency, as the Court wishes, it would still be possible to imagine some hypothetical Vermont registrant who uses his car initially exclusively in some other State. He, too, is situated similarly to Mr. Williams in that neither initially is using Vermont roads.

tinguish among present Vermont registrants," but to distinguish those who will likely use Vermont's roads immediately after they have purchased cars out-of-state from those who will not. Residency is not an irrational way to enact such a classification. Moreover, the Court's qualification misstates the language of the statute, for, as indicated, § 8911(9) does not distinguish among residents depending upon where they first *used* their cars, but upon where they *acquired* their cars. A classification based on the assumption that people will use their cars in the States where they live, rather than in the States where they acquire them, is far from the kind of "palpably arbitrary" classification that the Court previously has struck down on equal protection grounds. See *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S., at 527.

D

Having interpreted the statute so as to generate some discrimination, and then having declared the discrimination "wholly arbitrary," the Court felicitously retreats to a holding sufficiently narrow as to strip its decision of any constitutional significance. The problem is not that the statute actually discriminates, we are told, but that the Vermont Superior Court dismissed the equal protection challenge before there was record evidence of "'the actuality of [the statute's] operation.'" *Ante*, at 28, quoting *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 69 (1963). The implication is that equal protection challenges to tax statutes may never be dismissed on the pleadings when the plaintiff can concoct a discriminatory application of the statute, no matter how farfetched. Were it to be given any general application, this would be a mischievous rule of law, especially when, as here, the discrimination that has been seized upon was not even identified with particularity in the complaint. It does, however, leave Vermont's taxing power intact.

This follows because the State need take only one of a number of actions to save its statute. It may produce an ad-

ministrative regulation clarifying the scope of the exception. See Vt. Stat. Ann., Tit. 32, § 8901 (1981). It may introduce evidence at trial concerning the statute's application. Or it may introduce evidence to show that a classification based upon residency is a rational way to assess for road use—a proposition that until today I thought was self-evident. And if the state courts on remand find that the statute does not discriminate as applied, or that the discrimination is rationally related to a legitimate governmental purpose, that, too, should end this litigation.

This, then, is another case which approaches the status of a "noncase, made seemingly attractive by high-sounding suggestions of inequality and unfairness." *Austin* v. *New Hampshire*, 420 U. S. 656, 670 (1975) (dissenting opinion).[5] Mr. Williams and Ms. Levine apparently delayed the day on which they were required to pay for their right to use Vermont's roads by failing to register their cars within the time period set by Vermont law.[6] Today the Court does little

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[5] This is a noncase in another sense as well. Since all States apparently forgo payment of their sales tax by out-of-state purchasers of automobiles, see *J. C. Penney Co.* v. *Hardesty*, 164 W. Va. 525, 538–539, 264 S. E. 2d 604, 613 (1980), § 8911(9) might well be entirely superfluous, as no out-of-state purchaser will ever be required to pay a sales tax which could be credited against Vermont's use tax pursuant to § 8911(9). I doubt that a statute offering a tax credit that is never applied can violate equal protection.

[6] Vermont automobile owners are required to register their cars in Vermont when they become residents of the State. Vt. Stat. Ann., Tit. 23, §§ 4(30), 301 (1978). In appellants' case, liability for the tax arose six months after they accepted employment in the State, at which time they became Vermont residents. Vt. Stat. Ann., Tit. 32, § 8902(2) (1981). Mr. Williams accepted employment in Vermont on February 1, 1981, App. 5, and so was required to register his car before August 1 of that year. He did not attempt to register it, however, until his Illinois registration expired on September 30, 1981. Similarly, Ms. Levine accepted employment in Vermont in November 1979, *ibid.*, and was required to register her car in May 1980. She did not attempt to do so until December 1982, when her New York registration was about to expire.

more than add to this delay by forcing the State to develop a record to prove the rationality of a manifestly rational distinction. Thus the Court requires unnecessary litigation and for the time being deprives Vermont of $282 in taxes to which it is entitled.

I would affirm the judgment of the Supreme Court of Vermont.

WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83–812. Argued December 4, 1984—Decided June 4, 1985*

In proceedings instituted in Federal District Court, appellees challenged the constitutionality of, *inter alia*, a 1981 Alabama Statute (§ 16–1–20.1) authorizing a 1-minute period of silence in all public schools "for meditation or voluntary prayer." Although finding that § 16–1–20.1 was an effort to encourage a religious activity, the District Court ultimately held that the Establishment Clause of the First Amendment does not prohibit a State from establishing a religion. The Court of Appeals reversed.

Held: Section 16–1–20.1 is a law respecting the establishment of religion and thus violates the First Amendment. Pp. 48–61.

(a) The proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does Congress is firmly embedded in constitutional jurisprudence. The First Amendment was adopted to curtail Congress' power to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience, and the Fourteenth Amendment imposed the same substantive limitations on the States' power to legislate. The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. Moreover, the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. Pp. 48–55.

(b) One of the well-established criteria for determining the constitutionality of a statute under the Establishment Clause is that the statute must have a secular legislative purpose. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613. The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion. Pp. 55–56.

(c) The record here not only establishes that § 16–1–20.1's purpose was to endorse religion, it also reveals that the enactment of the statute was not motivated by any clearly secular purpose. In particular, the statements of § 16–1–20.1's sponsor in the legislative record and in his

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*Together with No. 83–929, *Smith et al.* v. *Jaffree et al.*, also on appeal from the same court.

testimony before the District Court indicate that the legislation was solely an "effort to return voluntary prayer" to the public schools. Moreover, such unrebutted evidence of legislative intent is confirmed by a consideration of the relationship between § 16–1–20.1 and two other Alabama statutes—one of which, enacted in 1982 as a sequel to § 16–1–20.1, authorized teachers to lead "willing students" in a prescribed prayer, and the other of which, enacted in 1978 as § 16–1–20.1's predecessor, authorized a period of silence "for meditation" only. The State's endorsement, by enactment of § 16–1–20.1, of prayer activities at the beginning of each schoolday is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion. Pp. 56–61.

705 F. 2d 1526 and 713 F. 2d 614, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 62. O'CONNOR, J., filed an opinion concurring in the judgment, *post*, p. 67. BURGER, C. J., *post*, p. 84, WHITE, J., *post*, p. 90, and REHNQUIST, J., *post*, p. 91, filed dissenting opinions.

John S. Baker, Jr., argued the cause for appellants in both cases and filed briefs for appellant Wallace in No. 83–812. *Thomas O. Kotouc* and *Thomas F. Parker IV* filed briefs for appellants in No. 83–929.

Deputy Solicitor General Bator argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Michael W. McConnell*, and *Brian K. Landsburg*.

Ronnie L. Williams argued the cause and filed a brief for appellees.†

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†Briefs of *amici curiae* urging reversal were filed for the State of Delaware et al. by *Charles M. Oberly III*, Attorney General of Delaware, *Fred S. Silverman*, State Solicitor, and *Susan H. Kirk-Ryan* and *Barbara MacDonald*, Deputy Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *Linley E. Pearson*, Attorney General of Indiana, *William J. Guste, Jr.*, Attorney General of Louisiana, *Michael C. Turpen*, Attorney General of Oklahoma, and *Gerald L. Baliles*, Attorney General of Virginia; for the State of Connecticut by *Joseph I. Lieberman*, Attorney General, *Henry S. Cohn*, Assistant Attorney General, and *Clarine Nardi Riddle;*

JUSTICE STEVENS delivered the opinion of the Court.

At an early stage of this litigation, the constitutionality of three Alabama statutes was questioned: (1) § 16–1–20, enacted in 1978, which authorized a 1-minute period of silence in all public schools "for meditation";[1] (2) § 16–1–20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer";[2] and (3) § 16–1–20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world."[3]

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for the Center for Judicial Studies by *Charles E. Rice;* for the Christian Legal Society et al. by *Forest D. Montgomery* and *Samuel E. Ericsson;* for the Freedom Council by *James J. Knicely* and *John W. Whitehead;* for the Legal Foundation of America by *David Crump;* for the Moral Majority, Inc., by *William Bentley Ball* and *Philip J. Murren;* and for Winston C. Anderson et al. by *Alfred J. Mainini.*

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Jack D. Novik, Burt Neuborne, John Sexton,* and *Nathan Z. Dershowitz;* for the American Jewish Congress et al. by *Marc D. Stern, Justin J. Finger,* and *Jeffrey P. Sinensky;* and for Lowell P. Weicker, Jr., by *Stanley A. Twardy, Jr.*

[1] Alabama Code § 16–1–20 (Supp. 1984) reads as follows:

"At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in."

Appellees have abandoned any claim that § 16–1–20 is unconstitutional. See Brief for Appellees 2.

[2] Alabama Code § 16–1–20.1 (Supp. 1984) provides:

"At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in."

[3] Alabama Code § 16–1–20.2 (Supp. 1984) provides:

"From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead

At the preliminary-injunction stage of this case, the District Court distinguished § 16–1–20 from the other two statutes. It then held that there was "nothing wrong" with § 16–1–20,[4] but that §§ 16–1–20.1 and 16–1–20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity."[5] After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.[6]

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both § 16–1–20.1 and § 16–1–20.2, and held them both unconstitutional.[7] We have already affirmed the Court of Appeals' holding with respect to § 16–1–20.2.[8] Moreover, appellees have not questioned the holding that § 16–1–20 is valid.[9] Thus, the narrow question for decision is whether § 16–1–20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a

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willing students in prayer, or may lead the willing students in the following prayer to God:

"Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen."

[4] The court stated that it did not find any potential infirmity in § 16–1–20 because "it is a statute which prescribes nothing more than a child in school shall have the right to meditate in silence and there is nothing wrong with a little meditation and quietness." *Jaffree* v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982).

[5] *Ibid.*

[6] *Jaffree* v. *Board of School Comm'rs of Mobile County*, 554 F. Supp. 1104, 1128 (SD Ala. 1983).

[7] 705 F. 2d 1526, 1535–1536 (CA11 1983).

[8] *Wallace* v. *Jaffree*, 466 U. S. 924 (1984).

[9] See n. 1, *supra*.

law respecting the establishment of religion within the meaning of the First Amendment.[10]

I

Appellee Ishmael Jaffree is a resident of Mobile County, Alabama. On May 28, 1982, he filed a complaint on behalf of three of his minor children; two of them were second-grade students and the third was then in kindergarten. The complaint named members of the Mobile County School Board, various school officials, and the minor plaintiffs' three teachers as defendants.[11] The complaint alleged that the appellees brought the action "seeking principally a declaratory judgment and an injunction restraining the Defendants and each of them from maintaining or allowing the maintenance of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools in violation of the First Amendment as made applicable to states by the Fourteenth Amendment to the United States Constitution."[12] The complaint further alleged that two of the children had been subjected to various acts of religious indoctrination "from the beginning of the school year in September, 1981";[13] that the defendant teachers had "on a daily basis" led their classes in saying certain prayers in unison;[14] that the minor children were exposed to ostracism from their peer group class members if they did not participate;[15] and that Ishmael Jaffree had repeatedly but unsuccessfully requested that the devotional services be stopped. The original complaint made no reference to any Alabama statute.

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[10] The Establishment Clause of the First Amendment, of course, has long been held applicable to the States. *Everson* v. *Board of Education*, 330 U. S. 1, 15–16 (1947).

[11] App. 4–7.

[12] *Id.*, at 4.

[13] *Id.*, at 7.

[14] *Ibid.*

[15] *Id.*, at 8–9.

On June 4, 1982, appellees filed an amended complaint seeking class certification,[16] and on June 30, 1982, they filed a second amended complaint naming the Governor of Alabama and various state officials as additional defendants. In that amendment the appellees challenged the constitutionality of three Alabama statutes: §§ 16–1–20, 16–1–20.1, and 16–1–20.2.[17]

On August 2, 1982, the District Court held an evidentiary hearing on appellees' motion for a preliminary injunction. At that hearing, State Senator Donald G. Holmes testified that he was the "prime sponsor" of the bill that was enacted in 1981 as § 16–1–20.1.[18] He explained that the bill was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction."[19] Apart from the purpose to return voluntary prayer to public school, Senator Holmes unequivocally testified that he had "no other purpose in mind."[20] A week after the hearing, the District Court entered a preliminary injunction.[21] The court held that appellees were likely to prevail on the merits because the enactment of §§ 16–1–20.1 and 16–1–20.2 did not reflect a clearly secular purpose.[22]

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[16] *Id.*, at 17.

[17] *Id.*, at 21. See nn. 1, 2, and 3, *supra*.

[18] App. 47–49.

[19] *Id.*, at 50.

[20] *Id.*, at 52.

[21] *Jaffree* v. *James*, 544 F. Supp. 727 (SD Ala. 1982).

[22] See *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971). Insofar as relevant to the issue now before us, the District Court explained:

"The injury to plaintiffs from the possible establishment of a religion by the State of Alabama contrary to the proscription of the establishment clause outweighs any indirect harm which may occur to defendants as a result of an injunction. Granting an injunction will merely maintain the status quo existing prior to the enactment of the statutes.

. . . . . .

"The purpose of Senate Bill 8 [§ 16–1–20.2] as evidenced by its preamble, is to provide for a prayer that may be given in public schools. Senator

In November 1982, the District Court held a 4-day trial on the merits. The evidence related primarily to the 1981–1982 academic year—the year after the enactment of § 16–1–20.1 and prior to the enactment of § 16–1–20.2. The District Court found that during that academic year each of the minor plaintiffs' teachers had led classes in prayer activities, even after being informed of appellees' objections to these activities.[23]

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the

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Holmes testified that his purpose in sponsoring § 16–1–20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this country. *See* Alabama Senate Journal 921 (1981). The Fifth Circuit has explained that 'prayer is a primary religious activity in itself. . . .' *Karen B.* v. *Treen*, 653 F. 2d 897, 901 (5th Cir. 1981). The state may not employ a religious means in its public schools. *Abington School District* v. *Schempp*, [374 U. S. 203, 224] (1963). Since these statutes do not reflect a clearly secular purpose, no consideration of the remaining two-parts of the *Lemon* test is necessary.

"The enactment of Senate Bill 8 [§ 16–1–20.2] and § 16–1–20.1 is an effort on the part of the State of Alabama to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion. *Engel* v. *Vitale*, [370 U. S. 421, 430] (1962). Thus, binding precedent which this Court is under a duty to follow indicates the substantial likelihood plaintiffs will prevail on the merits." 544 F. Supp., at 730–732.

[23] The District Court wrote:

"Defendant Boyd, as early as September 16, 1981, led her class at E. R. Dickson in singing the following phrase:

"'God is great, God is good,

"'Let us thank him for our food,

"'bow our heads we all are fed,

"'Give us Lord our daily bread.

"'Amen!'

"The recitation of this phrase continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion."[24] In a separate opinion, the District Court dismissed appellees' challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court's dismissal of this challenge was also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.[25]

"'God is great, God is good,

"'Let us thank him for our food.'

"Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

"'Our Father, which are in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.'

"The recitation of these phrases continued on a daily basis throughout the 1981–82 school year.

. . . . .

"Ms. Green admitted that she frequently leads her class in singing the following song:

"'For health and strength and daily food, we praise Thy name, Oh Lord.'

"This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song." *Jaffree* v. *Board of School Comm'rs of Mobile County*, 554 F. Supp., at 1107–1108.

[24] *Id.*, at 1128.

[25] *Jaffree* v. *James*, 554 F. Supp. 1130, 1132 (SD Ala. 1983). The District Court's opinion was announced on January 14, 1983. On February 11, 1983, JUSTICE POWELL, in his capacity as Circuit Justice for the Eleventh Circuit, entered a stay which in effect prevented the District Court

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. The Court of Appeals noted that this Court had considered and had rejected the historical argu-

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from dissolving the preliminary injunction that had been entered in August 1982. JUSTICE POWELL accurately summarized the prior proceedings:

"The situation, quite briefly, is as follows: Beginning in the fall of 1981, teachers in the minor applicants' schools conducted prayers in their regular classes, including group recitations of the Lord's Prayer. At the time, an Alabama statute provided for a one-minute period of silence 'for meditation or voluntary prayer' at the commencement of each day's classes in the public elementary schools. Ala. Code § 16–1–20.1 (Supp. 1982). In 1982, Alabama enacted a statute permitting public school teachers to lead their classes in prayer. 1982 Ala. Acts 735.

"Applicants, objecting to prayer in the public schools, filed suit to enjoin the activities. They later amended their complaint to challenge the applicable state statutes. After a hearing, the District Court granted a preliminary injunction. *Jaffree* v. *James*, 544 F. Supp. 727 (1982). It recognized that it was bound by the decisions of this Court, *id.*, at 731, and that under those decisions it was 'obligated to enjoin the enforcement' of the statutes, *id.*, at 733.

"In its subsequent decision on the merits, however, the District Court reached a different conclusion. *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (1983). It again recognized that the prayers at issue, given in public school classes and led by teachers, were violative of the Establishment Clause of the First Amendment as that Clause had been construed by this Court. The District Court nevertheless ruled 'that the United States Supreme Court has erred.' *Id.*, at 1128. It therefore dismissed the complaint and dissolved the injunction.

"There can be little doubt that the District Court was correct in finding that conducting prayers as part of a school program is unconstitutional under this Court's decisions. In *Engel* v. *Vitale*, 370 U. S. 421 (1962), the Court held that the Establishment Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, prohibits a State from authorizing prayer in the public schools. The following Term, in *Murray* v. *Curlett*, decided with *Abington School District* v. *Schempp*, 374 U. S. 203 (1963), the Court explicitly invalidated a school district's rule providing for the reading of the Lord's Prayer as part of a school's opening exercises, despite the fact that participation in those exercises was voluntary.

"Unless and until this Court reconsiders the foregoing decisions, they appear to control this case. In my view, the District Court was obligated

ments that the District Court found persuasive, and that the District Court had misapplied the doctrine of *stare decisis*.[26] The Court of Appeals then held that the teachers' religious activities violated the Establishment Clause of the First Amendment.[27] With respect to § 16–1–20.1 and § 16–1–20.2, the Court of Appeals stated that "both statutes advance and encourage religious activities."[28] The Court of Appeals then quoted with approval the District Court's finding that § 16–1–20.1, and § 16–1–20.2, were efforts "'to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion.'"[29] Thus, the Court of Appeals concluded that both statutes were "specifically the type which the Supreme Court addressed in *Engel* [v. *Vitale*, 370 U. S. 421 (1962)]."[30]

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to follow them." *Jaffree* v. *Board of School Comm'rs of Mobile County*, 459 U. S. 1314, 1315–1316 (1983).

[26] The Court of Appeals wrote:

"The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court. *See* 20 Am. Jur. 2d *Courts* § 183 (1965).

"Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court. *Hutto* v. *Davis*, [454 U. S. 370, 375] (1982) . . . . Justice Rehnquist emphasized the importance of precedent when he observed that 'unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.' *Davis*, [454 U. S. at 375]. *See Also, Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, [460 U. S. 533, 535] (1983) (the Supreme Court, in a per curiam decision, recently stated: 'Needless to say, only this Court may overrule one of its precedents')." 705 F. 2d, at 1532.

[27] *Id.*, at 1533–1534. This Court has denied a petition for a writ of certiorari that presented the question whether the Establishment Clause prohibited the teachers' religious prayer activities. *Board of School Comm'rs of Mobile County* v. *Jaffree*, 466 U. S. 926 (1984).

[28] 705 F. 2d, at 1535.

[29] *Ibid.*

[30] *Ibid.* After noting that the invalidity of § 16–1–20.2 was aggravated by "the existence of a government composed prayer," and that the propo-

A suggestion for rehearing en banc was denied over the dissent of four judges who expressed the opinion that the full court should reconsider the panel decision insofar as it held § 16–1–20.1 unconstitutional.[31] When this Court noted probable jurisdiction, it limited argument to the question that those four judges thought worthy of reconsideration. The judgment of the Court of Appeals with respect to the other issues presented by the appeals was affirmed. *Wallace* v. *Jaffree*, 466 U. S. 924 (1984).

II

Our unanimous affirmance of the Court of Appeals' judgment concerning § 16–1–20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms

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nents of the legislation admitted that that section "amounts to the establishment of a state religion," the court added this comment on § 16–1–20.1:

"The objective of the meditation or prayer statute (Ala. Code § 16–1–20.1) was also the advancement of religion. This fact was recognized by the district court at the hearing for preliminary relief where it was established that the intent of the statute was to return prayer to the public schools. *James*, 544 F. Supp. at 731. The existence of this fact and the inclusion of prayer obviously involves the state in religious activities. *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn. 1982). This demonstrates a lack of secular legislative purpose on the part of the Alabama Legislature. Additionally, the statute has the primary effect of advancing religion. We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity itself that concerns us; it is the purpose of the activity that we shall scrutinize. Thus, the existence of these elements require that we also hold section 16–1–20.1 in violation of the establishment clause." *Id.*, at 1535–1536.

[31] 713 F. 2d 614 (CA11 1983) *(per curiam)*.

protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.[32] Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraints on the exercise of federal power simply did not apply to the States.[33] But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again.[34]

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[32] The First Amendment provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[33] See *Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 609 (1845).

[34] See, *e. g.*, *Wooley* v. *Maynard*, 430 U. S. 705, 714 (1977) (right to refuse endorsement of an offensive state motto); *Terminiello* v. *Chicago*, 337 U. S. 1, 4 (1949) (right to free speech); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 637–638 (1943) (right to refuse to participate in a ceremony that offends one's conscience); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940) (right to proselytize one's religious faith); *Hague* v. *CIO*, 307 U. S. 496, 519 (1939) (opinion of Stone, J.) (right to assemble peaceably); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931) (right to publish an unpopular newspaper); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (Brandeis, J., concurring) (right to advocate the cause of Communism); *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting) (right to express an unpopular opinion); cf. *Abington School District* v. *Schempp*, 374 U. S. 203, 215, n. 7 (1963), where the Court approvingly quoted *Board of Education* v. *Minor*, 23 Ohio St. 211, 253 (1872), which stated:

"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is

Writing for a unanimous Court in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), Justice Roberts explained:

> ". . . We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion."

Cantwell, of course, is but one case in which the Court has identified the individual's freedom of conscience as the central liberty that unifies the various Clauses in the First Amendment.[35] Enlarging on this theme, THE CHIEF JUSTICE recently wrote:

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eminently one of these interests, lying outside the true and legitimate province of government."

[35] For example, in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court wrote:

"If by this position appellant seeks for freedom of conscience a broader protection than for freedom of the mind, it may be doubted that any of the great liberties insured by the First Article can be given higher place than the others. All have preferred position in our basic scheme. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296. All are interwoven there together. Differences there are, in them and in the modes

"We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. See *Board of Education* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *id.*, at 645 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 637.

. . . . .

"The Court in *Barnette*, *supra*, was faced with a state statute which required public school students to participate in daily public ceremonies by honoring the flag both with words and traditional salute gestures. In overruling its prior decision in *Minersville District* v. *Gobitis*, 310 U. S. 586 (1940), the Court held that 'a ceremony so touching matters of opinion and political attitude may [not] be imposed upon the individual by official authority under powers committed to any political organization under our Constitution.' 319 U. S., at 636. Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree. Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an

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appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings." See also *Widmar* v. *Vincent*, 454 U. S. 263, 269 (1981) (stating that religious worship and discussion "are forms of speech and association protected by the First Amendment").

> instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State 'invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' *Id.*, at 642." *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977).

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.[36] But when the underlying principle has been examined in the crucible of litigation, the

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[36] Thus Joseph Story wrote:

"Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation." 2 J. Story, Commentaries on the Constitution of the United States § 1874, p. 593 (1851) (footnote omitted).

In the same volume, Story continued:

"The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; *but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion,* which had been trampled upon almost from the days of the Apostles to the present age. . . ." *Id.*, § 1877, at 594 (emphasis supplied).

Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.[37] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful,[38]

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[37] Thus, in *Everson* v. *Board of Education*, 330 U. S., at 15, the Court stated:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."

Id., at 18 (the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers"); *Abington School District* v. *Schempp*, 374 U. S., at 216 ("this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another"); *id.*, at 226 ("The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality"); *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961) ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs").

[38] In his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

"1. Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the [Manner of discharging it, can be directed only by reason and] conviction, not by force or violence.' The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is

and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain.[39]

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unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. . . . We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.

. . . . . .

"3. Because, it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" The Complete Madison 299–301 (S. Padover ed. 1953).

See also *Engel* v. *Vitale*, 370 U. S. 421, 435 (1962) ("It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look for religious guidance").

[39] As the *Barnette* opinion explained, it is the teaching of history, rather than any appraisal of the quality of a State's motive, that supports this duty to respect basic freedoms:

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary

As Justice Jackson eloquently stated in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943):

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

The State of Alabama, no less than the Congress of the United States, must respect that basic truth.

III

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), we wrote:

> "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968); finally, the statute must not foster 'an excessive

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to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." 319 U. S., at 640–641.

See also *Engel* v. *Vitale*, 370 U. S., at 431 ("a union of government and religion tends to destroy government and to degrade religion").

government entanglement with religion.' *Walz* [v. *Tax Comm'n*, 397 U. S. 664, 674 (1970)]."

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.[40] For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, see, *e. g.*, *Abington School District* v. *Schempp*, 374 U. S. 203, 296–303 (1963) (BRENNAN, J., concurring), the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.[41]

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[42] In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of § 16–1–20.1 was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose.

IV

The sponsor of the bill that became § 16–1–20.1, Senator Donald Holmes, inserted into the legislative record—appar-

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[40] See n. 22, *supra*.

[41] See *Lynch* v. *Donnelly*, 465 U. S. 668, 680 (1984); *id.*, at 690 (O'CONNOR, J., concurring); *id.*, at 697 (BRENNAN, J., joined by MARSHALL, BLACKMUN, and STEVENS, JJ., dissenting); *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983); *Widmar* v. *Vincent*, 454 U. S., at 271; *Stone* v. *Graham*, 449 U. S. 39, 40–41 (1980) *(per curiam)*; *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977).

[42] *Lynch* v. *Donnelly*, 465 U. S., at 690 (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid").

ently without dissent—a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools.[43] Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated: "No, I did not have no other purpose in mind."[44] The State did not present evidence of *any* secular purpose.[45]

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[43] The statement indicated, in pertinent part:

"Gentlemen, by passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. *I believe this effort to return voluntary prayer* to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard *on this legislation to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.*" App. 50 (emphasis added).

[44] *Id.*, at 52. The District Court and the Court of Appeals agreed that the purpose of § 16–1–20.1 was "an effort on the part of the State of Alabama to encourage a religious activity." *Jaffree* v. *James*, 544 F. Supp., at 732; 705 F. 2d, at 1535. The evidence presented to the District Court elaborated on the express admission of the Governor of Alabama (then Fob James) that the enactment of § 16–1–20.1 was intended to "clarify [the State's] intent to have prayer as part of the daily classroom activity," compare Second Amended Complaint ¶ 32(d) (App. 24–25) with Governor's Answer to § 32(d) (App. 40); and that the "expressed legislative purpose in enacting Section 16–1–20.1 (1981) was to 'return voluntary prayer to public schools,'" compare Second Amended Complaint ¶¶ 32(b) and (c) (App. 24) with Governor's Answer to ¶¶ 32(b) and (c) (App. 40).

[45] Appellant Governor George C. Wallace now argues that § 16–1–20.1 "is best understood as a permissible accommodation of religion" and that viewed even in terms of the *Lemon* test, the "statute conforms to acceptable constitutional criteria." Brief for Appellant Wallace 5; see also Brief for Appellants Smith et al. 39 (§ 16–1–20.1 "accommodates the free exercise of the religious beliefs and free exercise of speech and belief of those affected"); *id.*, at 47. These arguments seem to be based on the theory that the free exercise of religion of some of the State's citizens was burdened

The unrebutted evidence of legislative intent contained in the legislative record and in the testimony of the sponsor of § 16–1–20.1 is confirmed by a consideration of the relationship between this statute and the two other measures that were considered in this case. The District Court found that the 1981 statute and its 1982 sequel had a common, nonsecular purpose. The wholly religious character of the later enactment is plainly evident from its text. When the differences between § 16–1–20.1 and its 1978 predecessor, § 16–1–20, are examined, it is equally clear that the 1981 statute has the same wholly religious character.

There are only three textual differences between § 16–1–20.1 and § 16–1–20: (1) the earlier statute applies only to grades one through six, whereas § 16–1–20.1 applies to all grades; (2) the earlier statute uses the word "shall" whereas § 16–1–20.1 uses the word "may"; (3) the earlier statute refers

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before the statute was enacted. The United States, appearing as *amicus curiae* in support of the appellants, candidly acknowledges that "it is unlikely that in most contexts a strong Free Exercise claim could be made that time for personal prayer must be set aside during the school day." Brief for United States as *Amicus Curiae* 10. There is no basis for the suggestion that § 16–1–20.1 "is a means for accommodating the religious and meditative needs of students without in any way diminishing the school's own neutrality or secular atmosphere." *Id.*, at 11. In this case, it is undisputed that at the time of the enactment of § 16–1–20.1 there was no governmental practice impeding students from silently praying for one minute at the beginning of each schoolday; thus, there was no need to "accommodate" or to exempt individuals from any general governmental requirement because of the dictates of our cases interpreting the Free Exercise Clause. See, *e. g.*, *Thomas* v. *Review Board, Indiana Employment Security Div.*, 450 U. S. 707 (1981); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); see also *Abington School District* v. *Schempp*, 374 U. S., at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone*, it has never meant that a majority could use the machinery of the State to practice its beliefs"). What was missing in the appellants' eyes at the time of the enactment of § 16–1–20.1—and therefore what is precisely the aspect that makes the statute unconstitutional—was the State's endorsement and promotion of religion and a particular religious practice.

only to "meditation" whereas § 16–1–20.1 refers to "meditation or voluntary prayer." The first difference is of no relevance in this litigation because the minor appellees were in kindergarten or second grade during the 1981–1982 academic year. The second difference would also have no impact on this litigation because the mandatory language of § 16–1–20 continued to apply to grades one through six.[46] Thus, the only significant textual difference is the addition of the words "or voluntary prayer."

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation.[47] Appellants have not identified any secular purpose that was not fully served by § 16–1–20 before the enactment of § 16–1–20.1. Thus, only two conclusions are consistent with the text of § 16–1–20.1: (1) the statute was enacted to convey a message of state endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act.[48]

We must, therefore, conclude that the Alabama Legislature intended to change existing law[49] and that it was moti-

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[46] See n. 1, *supra*.

[47] Indeed, for some persons meditation itself may be a form of prayer. B. Larson, Larson's Book of Cults 62–65 (1982); C. Whittier, Silent Prayer and Meditation in World Religions 1–7 (Congressional Research Service 1982).

[48] If the conclusion that the statute had no purpose were tenable, it would remain true that *no purpose* is not a *secular purpose*. But such a conclusion is inconsistent with the common-sense presumption that statutes are usually enacted to change existing law. Appellants do not even suggest that the State had no purpose in enacting § 16–1–20.1.

[49] *United States* v. *Champlin Refining Co.*, 341 U. S. 290, 297 (1951) (a "statute cannot be divorced from the circumstances existing at the time it

vated by the same purpose that the Governor's answer to the second amended complaint expressly admitted; that the statement inserted in the legislative history revealed; and that Senator Holmes' testimony frankly described. The legislature enacted § 16–1–20.1, despite the existence of § 16–1–20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion.[50]

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority.[51] For whenever the State itself speaks on a religious

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was passed"); *id.*, at 298 (refusing to attribute pointless purpose to Congress in the absence of facts to the contrary); *United States* v. *National City Lines, Inc.*, 337 U. S. 78, 80–81 (1949) (rejecting Government's argument that Congress had no desire to change law when enacting legislation).

[50] See, *e. g.*, *Stone* v. *Graham*, 449 U. S., at 42 *(per curiam)*; *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion"); *Epperson* v. *Arkansas*, 393 U. S. 97, 109 (1968); *Abington School District* v. *Schempp*, 374 U. S., at 215–222; *Engel* v. *Vitale*, 370 U. S., at 430 ("Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause"); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 211–212 (1948); *Everson* v. *Board of Education*, 330 U. S., at 18.

[51] As this Court stated in *Engel* v. *Vitale*, 370 U. S., at 430:

"The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."

Moreover, this Court has noted that "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the pre-

subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."[52] The well-supported concurrent findings of the District Court and the Court of Appeals—that § 16–1–20.1 was intended to convey a message of state approval of prayer activities in the public schools—make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,"[53] we conclude that § 16–1–20.1 violates the First Amendment.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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vailing officially approved religion is plain." *Id.*, at 431. This comment has special force in the public-school context where attendance is mandatory. Justice Frankfurter acknowledged this reality in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S., at 227 (concurring opinion):

"That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."

See also *Abington School District* v. *Schempp*, 374 U. S., at 290 (BRENNAN, J., concurring); cf. *Marsh* v. *Chambers*, 463 U. S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"). Further, this Court has observed:

"That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia Board of Education* v. *Barnette*, 319 U. S., at 637.

[52] *Lynch* v. *Donnelly*, 465 U. S., at 690–691 (O'CONNOR, J., concurring) ("The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. . . . The proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion").

[53] *Id.*, at 694.

JUSTICE POWELL, concurring.

I concur in the Court's opinion and judgment that Ala. Code § 16–1–20.1 (Supp. 1984) violates the Establishment Clause of the First Amendment. My concurrence is prompted by Alabama's persistence in attempting to institute state-sponsored prayer in the public schools by enacting three successive statutes.[1] I agree fully with JUSTICE O'CONNOR's assertion that some moment-of-silence statutes may be constitutional,[2] a suggestion set forth in the Court's opinion as well. *Ante*, at 59.

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[1] The three statutes are Ala. Code § 16–1–20 (Supp. 1984) (moment of silent meditation); Ala. Code § 16–1–20.1 (Supp. 1984) (moment of silence for meditation or prayer); and Ala. Code § 16–1–20.2 (Supp. 1984) (teachers authorized to lead students in vocal prayer). These statutes were enacted over a span of four years. There is some question whether § 16–1–20 was repealed by implication. The Court already has summarily affirmed the Court of Appeals' holding that § 16–1–20.2 is invalid. *Wallace* v. *Jaffree*, 466 U. S. 924 (1984). Thus, our opinions today address only the validity of § 16–1–20.1. See *ante*, at 41–42.

[2] JUSTICE O'CONNOR is correct in stating that moment-of-silence statutes cannot be treated in the same manner as those providing for vocal prayer:

"A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one Member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, [374 U. S.,] at 281 (BRENNAN, J., concurring) ('[T]he observance of a moment of reverent silence at the opening of class' may serve 'the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government'); L. Tribe,

I write separately to express additional views and to respond to criticism of the three-pronged *Lemon* test.[3] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted. Only once since our decision in *Lemon*, *supra*, have we addressed an Establishment Clause issue without resort to its three-pronged test. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).[4] *Lemon*, *supra*, has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis.[5]

American Constitutional Law § 14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Post*, at 72–73 (concurring in judgment).

[3] JUSTICE O'CONNOR asserts that the "standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment." *Post*, at 68 (concurring in judgment). JUSTICE REHNQUIST would discard the *Lemon* test entirely. *Post*, at 112 (dissenting).

As I state in the text, the *Lemon* test has been applied consistently in Establishment Clause cases since it was adopted in 1971. In a word, it has been the law. Respect for *stare decisis* should require us to follow *Lemon*. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 559 (1985) (POWELL, J., dissenting) ("The stability of judicial decision, and with it respect for the authority of this Court, are not served by the precipitous overruling of multiple precedents . . .").

[4] In *Marsh* v. *Chambers*, we held that the Nebraska Legislature's practice of opening each day's session with a prayer by a chaplain paid by the State did not violate the Establishment Clause of the First Amendment. Our holding was based upon the historical acceptance of the practice that had become "part of the fabric of our society." 463 U. S., at 792.

[5] *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), was a carefully considered opinion of THE CHIEF JUSTICE, in which he was joined by six other Jus-

The first inquiry under *Lemon* is whether the challenged statute has a "secular legislative purpose." *Lemon* v. *Kurtzman, supra,* at 612. As JUSTICE O'CONNOR recognizes, this secular purpose must be "sincere"; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a "sham." *Post,* at 75 (concurring in judgment). In *Stone* v. *Graham,* 449 U. S. 39 (1980) *(per curiam),* for example, we held that a statute requiring the posting of the Ten Commandments in public schools violated the Establishment Clause, even though the Kentucky Legislature asserted that its goal was educational. We have not interpreted the first prong of *Lemon, supra,* however, as requiring that a statute have "exclusively secular" objectives.[6] *Lynch* v. *Donnelly,* 465 U. S. 668, 681, n. 6 (1984). If such a requirement existed, much conduct and legislation approved by this Court in the past would have been invalidated. See, *e. g., Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970) (New York's property tax exemption for religious organizations upheld); *Everson* v. *Board of Education,* 330 U. S. 1 (1947) (holding that a township may reimburse parents for the cost of transporting their children to parochial schools).

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tices. *Lemon*'s three-pronged test has been repeatedly followed. In *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973), for example, the Court applied the "now well-defined three-part test" of *Lemon.* 413 U. S., at 772.

In *Lynch* v. *Donnelly,* 465 U. S. 668 (1984), we said that the Court is not "confined to any single test or criterion in this sensitive area." *Id.,* at 679. The decision in *Lynch,* like that in *Marsh* v. *Chambers,* was based primarily on the long historical practice of including religious symbols in the celebration of Christmas. Nevertheless, the Court, without any criticism of *Lemon,* applied its three-pronged test to the facts of that case. It focused on the "question . . . whether there is a secular purpose for [the] display of the crèche." 465 U. S., at 681.

[6] The Court's opinion recognizes that "a statute that is motivated in part by a religious purpose may satisfy the first criterion." *Ante,* at 56. The Court simply holds that "a statute must be invalidated if it is *entirely motivated* by a purpose to advance religion." *Ibid.* (emphasis added).

The record before us, however, makes clear that Alabama's purpose was solely religious in character. Senator Donald Holmes, the sponsor of the bill that became Alabama Code § 16–1–20.1 (Supp. 1984), freely acknowledged that the purpose of this statute was "to return voluntary prayer" to the public schools. See *ante*, at 57, n. 43. I agree with JUSTICE O'CONNOR that a single legislator's statement, particularly if made following enactment, is not necessarily sufficient to establish purpose. See *post*, at 77 (concurring in judgment). But, as noted in the Court's opinion, the religious purpose of § 16–1–20.1 is manifested in other evidence, including the sequence and history of the three Alabama statutes. See *ante*, at 58–60.

I also consider it of critical importance that neither the District Court nor the Court of Appeals found a secular purpose, while both agreed that the purpose was to advance religion. In its first opinion (enjoining the enforcement of § 16–1–20.1 pending a hearing on the merits), the District Court said that the statute did "not reflect a clearly secular purpose." *Jaffree* v. *James*, 544 F. Supp. 727, 732 (SD Ala. 1982). Instead, the District Court found that the enactment of the statute was an "effort on the part of the State of Alabama to encourage a religious activity."[7] *Ibid.* The Court of Appeals likewise applied the *Lemon* test and found "a lack of secular purpose on the part of the Alabama Legislature."

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[7] In its subsequent decision on the merits, the District Court held that prayer in the public schools—even if led by the teacher—did not violate the Establishment Clause of the First Amendment. The District Court recognized that its decision was inconsistent with *Engel* v. *Vitale*, 370 U. S. 421 (1962), and other decisions of this Court. The District Court nevertheless ruled that its decision was justified because "the United States Supreme Court has erred . . . ." *Jaffree* v. *Board of School Comm'rs of Mobile County*, 554 F. Supp. 1104, 1128 (SD Ala. 1983).

In my capacity as Circuit Justice, I stayed the judgment of the District Court pending appeal to the Court of Appeals for the Eleventh Circuit. *Jaffree* v. *Board of School Comm'rs of Mobile County*, 459 U. S. 1314 (1983) (in chambers).

705 F. 2d 1526, 1535 (CA11 1983). It held that the objective of § 16–1–20.1 was the "advancement of religion." *Ibid.* When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one.

I would vote to uphold the Alabama statute if it also had a clear secular purpose. See *Mueller* v. *Allen*, 463 U. S. 388, 394–395 (1983) (the Court is "reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). Nothing in the record before us, however, identifies a clear secular purpose, and the State also has failed to identify any nonreligious reason for the statute's enactment.[8] Under these circumstances, the Court is required by our precedents to hold that the statute fails the first prong of the *Lemon* test and therefore violates the Establishment Clause.

Although we do not reach the other two prongs of the *Lemon* test, I note that the "effect" of a straightforward moment-of-silence statute is unlikely to "advanc[e] or inhibi[t] religion."[9] See *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968). Nor would such a statute "foster 'an excessive government entanglement with religion.'" *Lemon*

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[8] Instead, the State criticizes the *Lemon* test and asserts that "the principal problems [with the test] stem from the *purpose* prong." See Brief for Appellant Wallace 9 *et seq.*

[9] If it were necessary to reach the "effects" prong of *Lemon*, we would be concerned primarily with the effect on the minds and feelings of immature pupils. As JUSTICE O'CONNOR notes, during "a moment of silence, a student who objects to prayer [even where prayer may be the purpose] is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others." *Post*, at 72 (concurring in judgment). Given the types of subjects youthful minds are primarily concerned with, it is unlikely that many children would use a simple "moment of silence" as a time for religious prayer. There are too many other subjects on the mind of the typical child. Yet there also is the likelihood that some children, raised in strongly religious families, properly would use the moment to reflect on the religion of his or her choice.

v. *Kurtzman*, 403 U. S., at 612–613, quoting *Walz* v. *Tax Comm'n*, 397 U. S., at 674.

I join the opinion and judgment of the Court.

JUSTICE O'CONNOR, concurring in the judgment.

Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting Ala. Code § 16–1–20 (Supp. 1984), which provides a moment of silence in appellees' schools each day. The parties to these proceedings concede the validity of this enactment. At issue in these appeals is the constitutional validity of an additional and subsequent Alabama statute, Ala. Code § 16–1–20.1 (Supp. 1984), which both the District Court and the Court of Appeals concluded was enacted solely to officially encourage prayer during the moment of silence. I agree with the judgment of the Court that, in light of the findings of the courts below and the history of its enactment, § 16–1–20.1 of the Alabama Code violates the Establishment Clause of the First Amendment. In my view, there can be little doubt that the purpose and likely effect of this subsequent enactment is to endorse and sponsor voluntary prayer in the public schools. I write separately to identify the peculiar features of the Alabama law that render it invalid, and to explain why moment of silence laws in other States do not necessarily manifest the same infirmity. I also write to explain why neither history nor the Free Exercise Clause of the First Amendment validates the Alabama law struck down by the Court today.

I

The Religion Clauses of the First Amendment, coupled with the Fourteenth Amendment's guarantee of ordered liberty, preclude both the Nation and the States from making any law respecting an establishment of religion or prohibiting

the free exercise thereof. *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940). Although a distinct jurisprudence has enveloped each of these Clauses, their common purpose is to secure religious liberty. See *Engel* v. *Vitale*, 370 U. S. 421, 430 (1962). On these principles the Court has been and remains unanimous.

As these cases once again demonstrate, however, "it is far easier to agree on the purpose that underlies the First Amendment's Establishment and Free Exercise Clauses than to obtain agreement on the standards that should govern their application." *Walz* v. *Tax Comm'n*, 397 U. S. 664, 694 (1970) (opinion of Harlan, J.). It once appeared that the Court had developed a workable standard by which to identify impermissible government establishments of religion. See *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). Under the now familiar *Lemon* test, statutes must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion, and in addition they must not foster excessive government entanglement with religion. *Id.*, at 612–613. Despite its initial promise, the *Lemon* test has proved problematic. The required inquiry into "entanglement" has been modified and questioned, see *Mueller* v. *Allen*, 463 U. S. 388, 403, n. 11 (1983), and in one case we have upheld state action against an Establishment Clause challenge without applying the *Lemon* test at all. *Marsh* v. *Chambers*, 463 U. S. 783 (1983). The author of *Lemon* himself apparently questions the test's general applicability. See *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984). JUSTICE REHNQUIST today suggests that we abandon *Lemon* entirely, and in the process limit the reach of the Establishment Clause to state discrimination between sects and government designation of a particular church as a "state" or "national" one. *Post*, at 108–113.

Perhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test. I do believe, however, that the standards announced in *Lemon* should be

reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 332–333 (1963) (footnotes omitted). Last Term, I proposed a refinement of the *Lemon* test with this goal in mind. *Lynch* v. *Donnelly*, 465 U. S., at 687–689 (concurring opinion).

The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Id.*, at 688. Under this view, *Lemon*'s inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement.

The endorsement test is useful because of the analytic content it gives to the *Lemon*-mandated inquiry into legislative purpose and effect. In this country, church and state must necessarily operate within the same community. Because of this coexistence, it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict, and combine. A statute that ostensibly promotes a secular interest

often has an incidental or even a primary effect of helping or hindering a sectarian belief. Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing. The task for the Court is to sort out those statutes and government practices whose purpose and effect go against the grain of religious liberty protected by the First Amendment.

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherent, for "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel* v. *Vitale*, *supra*, at 431. At issue today is whether state moment of silence statutes in general, and Alabama's moment of silence statute in particular, embody an impermissible endorsement of prayer in public schools.

A

Twenty-five states permit or require public school teachers to have students observe a moment of silence in their classrooms.[1] A few statutes provide that the moment of silence

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[1] See Ala. Code §§ 16–1–20, 16–1–20.1 (Supp. 1984): Ariz. Rev. Stat. Ann. § 15–522 (1984); Ark. Stat. Ann. § 80–1607.1 (1980); Conn. Gen. Stat. § 10–16a (1983); Del. Code Ann., Tit. 14, § 4101 (1981) (as interpreted in Del. Op. Atty. Gen. 79–I011 (1979)); Fla. Stat. § 233.062 (1983); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat., ch. 122, ¶ 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72.5308a (1980); La. Rev. Stat. Ann. § 17:2115(A) (West 1982); Me. Rev. Stat. Ann., Tit. 20–A, § 4805 (1983); Md. Educ. Code Ann. § 7–104 (1985); Mass. Gen. Laws Ann., ch. 71, § 1A (West 1982); Mich. Comp. Laws Ann. § 380.1565 (Supp. 1984–1985);

is for the purpose of meditation alone. See Ariz. Rev. Stat. Ann. § 15–522 (1984); Conn. Gen. Stat. § 10–16a (1983); R. I. Gen. Laws § 16–12–3.1 (1981). The typical statute, however, calls for a moment of silence at the beginning of the schoolday during which students may meditate, pray, or reflect on the activities of the day. See, *e. g.*, Ark. Stat. Ann. § 80–1607.1 (1980); Ga. Code Ann. § 20–2–1050 (1982); Ill. Rev. Stat., ch. 122, ¶ 771 (1983); Ind. Code § 20–10.1–7–11 (1982); Kan. Stat. Ann. § 72–5308a (1980); Pa. Stat. Ann., Tit. 24, § 15–1516.1 (Purdon Supp. 1984–1985). Federal trial courts have divided on the constitutionality of these moment of silence laws. Compare *Gaines* v. *Anderson*, 421 F. Supp. 337 (Mass. 1976) (upholding statute), with *May* v. *Cooperman*, 572 F. Supp. 1561 (NJ 1983) (striking down statute); *Duffy* v. *Las Cruces Public Schools*, 557 F. Supp. 1013 (NM 1983) (same); and *Beck* v. *McElrath*, 548 F. Supp. 1161 (MD Tenn. 1982) (same). See also *Walter* v. *West Virginia Board of Education*, Civ. Action No. 84–5366 (SD W. Va., Mar. 14, 1985) (striking down state constitutional amendment). Relying on this Court's decisions disapproving vocal prayer and Bible reading in the public schools, see *Abington School District* v. *Schempp*, 374 U. S. 203 (1963); *Engel* v. *Vitale*, 370 U. S. 421 (1962), the courts that have struck down the moment of silence statutes generally conclude that their purpose and effect are to encourage prayer in public schools.

The *Engel* and *Abington* decisions are not dispositive on the constitutionality of moment of silence laws. In those

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N. J. Stat. Ann. § 18A:36–4 (West Supp. 1984–1985); N. M. Stat. Ann. § 22–5–4.1 (1981); N. Y. Educ. Law § 3029–a (McKinney 1981); N. D. Cent. Code § 15–47–30.1 (1981); Ohio Rev. Code Ann. § 3313.60.1 (1980); Pa. Stat. Ann., Tit. 24, § 15.1516.1 (Purdon Supp. 1984–1985); R. I. Gen. Laws § 16–12–3.1 (1981); Tenn. Code Ann. § 49–6–1004 (1983); Va. Code § 22.1–203 (1980); W. Va. Const., Art. III, § 15–a. For a useful comparison of the provisions of many of these statutes, see Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N. Y. U. L. Rev. 364, 407–408 (1983).

cases, public school teachers and students led their classes in devotional exercises. In *Engel*, a New York statute required teachers to lead their classes in a vocal prayer. The Court concluded that "it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." 370 U. S., at 425. In *Abington*, the Court addressed Pennsylvania and Maryland statutes that authorized morning Bible readings in public schools. The Court reviewed the purpose and effect of the statutes, concluded that they required religious exercises, and therefore found them to violate the Establishment Clause. 374 U. S., at 223–224. Under all of these statutes, a student who did not share the religious beliefs expressed in the course of the exercise was left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity. The decisions acknowledged the coercion implicit under the statutory schemes, see *Engel*, *supra*, at 431, but they expressly turned only on the fact that the government was sponsoring a manifestly religious exercise.

A state-sponsored moment of silence in the public schools is different from state-sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one Member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional. See *Abington*, *supra*, at 281 (BRENNAN, J., concurring) ("[T]he observance of a mo-

ment of reverent silence at the opening of class" may serve "the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and goverment"); L. Tribe, American Constitutional Law §14–6, p. 829 (1978); P. Freund, The Legal Issue, in Religion and the Public Schools 23 (1965); Choper, 47 Minn. L. Rev., at 371; Kauper, Prayer, Public Schools, and the Supreme Court, 61 Mich. L. Rev. 1031, 1041 (1963). As a general matter, I agree. It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren.

By mandating a moment of silence, a State does not necessarily endorse any activity that might occur during the period. Cf. *Widmar* v. *Vincent*, 454 U. S. 263, 272, n. 11 (1981) ("[B]y creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there"). Even if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives. Nonetheless, it is also possible that a moment of silence statute, either as drafted or as actually implemented, could effectively favor the child who prays over the child who does not. For example, the message of endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray. Similarly, the face of the statute or its legislative history may clearly establish that it seeks to encourage or promote voluntary prayer over other alternatives, rather than merely provide a quiet moment that may be dedicated to prayer by those so inclined. The crucial question is whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer.[2]

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[2] Appellants argue that *Zorach* v. *Clauson*, 343 U. S. 306, 313–314 (1952), suggests there is no constitutional infirmity in a State's encouraging a child to pray during a moment of silence. The cited dicta from *Zorach*, however, is inapposite. There the Court stated that "[w]hen the state

This question cannot be answered in the abstract, but instead requires courts to examine the history, language, and administration of a particular statute to determine whether it operates as an endorsement of religion. *Lynch*, 465 U. S., at 694 (concurring opinion) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

Before reviewing Alabama's moment of silence law to determine whether it endorses prayer, some general observations on the proper scope of the inquiry are in order. First, the inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited. See *Everson* v. *Board of Education*, 330 U. S. 1, 6 (1947) (courts must exercise "the most extreme caution" in assessing whether a state statute has a proper public purpose). In determining whether the government intends a moment of silence statute to convey a message of endorsement or disapproval of religion, a court has no license to psychoanalyze the legislators. See *McGowan* v. *Maryland*, 366 U. S. 420, 466 (1961) (opinion of Frankfurter, J.). If a legislature expresses a plausible secular purpose for a moment of silence statute in either the text or the legislative history,[3] or if the statute disclaims an intent to encourage prayer over alternatives during a moment of silence,[4] then courts should gener-

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encourages religious instruction . . . *by adjusting the schedule of public events to sectarian needs*, it follows the best of our traditions." *Ibid.* (emphasis added). When the State provides a moment of silence during which prayer may occur at the election of the student, it can be said to be adjusting the schedule of public events to sectarian needs. But when the State also encourages the student to pray during a moment of silence, it converts an otherwise inoffensive moment of silence into an effort by the majority to use the machinery of the State to encourage the minority to participate in a religious exercise. See *Abington School District* v. *Schempp*, 374 U. S. 203, 226 (1963).

[3] See, *e. g.*, Tenn. Code Ann. § 49–6–1004 (1983).

[4] See, *e. g.*, W. Va. Const., Art. III, § 15–a.

ally defer to that stated intent. See *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 773 (1973); *Tilton* v. *Richardson*, 403 U. S. 672, 678–679 (1971). It is particularly troublesome to denigrate an expressed secular purpose due to postenactment testimony by particular legislators or by interested persons who witnessed the drafting of the statute. Even if the text and official history of a statute express no secular purpose, the statute should be held to have an improper purpose only if it is beyond purview that endorsement of religion or a religious belief "was and is the law's reason for existence." *Epperson* v. *Arkansas*, 393 U. S. 97, 108 (1968). Since there is arguably a secular pedagogical value to a moment of silence in public schools, courts should find an improper purpose behind such a statute only if the statute on its face, in its official legislative history, or in its interpretation by a responsible administrative agency suggests it has the primary purpose of endorsing prayer.

JUSTICE REHNQUIST suggests that this sort of deferential inquiry into legislative purpose "means little," because "it only requires the legislature to express any secular purpose and omit all sectarian references." *Post*, at 108. It is not a trivial matter, however, to require that the legislature manifest a secular purpose and omit all sectarian endorsements from its laws. That requirement is precisely tailored to the Establishment Clause's purpose of assuring that government not intentionally endorse religion or a religious practice. It is of course possible that a legislature will enunciate a sham secular purpose for a statute. I have little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one, or that the *Lemon* inquiry into the effect of an enactment would help decide those close cases where the validity of an expressed secular purpose is in doubt. While the secular purpose requirement alone may rarely be determinative in striking down a statute, it nevertheless serves an important function. It reminds government that

when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share. In this sense the secular purpose requirement is squarely based in the text of the Establishment Clause it helps to enforce.

Second, the *Lynch* concurrence suggested that the effect of a moment of silence law is not entirely a question of fact:

> "[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts." 465 U. S., at 693–694.

The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools. Cf. *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S. 485, 517–518, n. 1 (1984) (REHNQUIST, J., dissenting) (noting that questions whether fighting words are "likely to provoke the *average* person to retaliation," *Street* v. *New York*, 394 U. S. 576, 592 (1969), and whether allegedly obscene material appeals to "prurient interests," *Miller* v. *California*, 413 U. S. 15, 24 (1973), are mixed questions of law and fact that are properly subject to *de novo* appellate review). A moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test.

B

The analysis above suggests that moment of silence laws in many States should pass Establishment Clause scrutiny because they do not favor the child who chooses to pray during a moment of silence over the child who chooses to medi-

tate or reflect. Alabama Code § 16–1–20.1 (Supp. 1984) does not stand on the same footing. However deferentially one examines its text and legislative history, however objectively one views the message attempted to be conveyed to the public, the conclusion is unavoidable that the purpose of the statute is to endorse prayer in public schools. I accordingly agree with the Court of Appeals, 705 F. 2d 1526, 1535 (1983), that the Alabama statute has a purpose which is in violation of the Establishment Clause, and cannot be upheld.

In finding that the purpose of § 16–1–20.1 is to endorse voluntary prayer during a moment of silence, the Court relies on testimony elicited from State Senator Donald G. Holmes during a preliminary injunction hearing. *Ante*, at 56–57. Senator Holmes testified that the sole purpose of the statute was to return voluntary prayer to the public schools. For the reasons expressed above, I would give little, if any, weight to this sort of evidence of legislative intent. Nevertheless, the text of the statute in light of its official legislative history leaves little doubt that the purpose of this statute corresponds to the purpose expressed by Senator Holmes at the preliminary injunction hearing.

First, it is notable that Alabama already had a moment of silence statute before it enacted § 16–1–20.1. See Ala. Code § 16–1–20 (Supp. 1984), quoted *ante*, at 40, n. 1. Appellees do not challenge this statute—indeed, they concede its validity. See Brief for Appellees 2. The only significant addition made by § 16–1–20.1 is to specify expressly that voluntary prayer is one of the authorized activities during a moment of silence. Any doubt as to the legislative purpose of that addition is removed by the official legislative history. The sole purpose reflected in the official history is "to return voluntary prayer to our public schools." App. 50. Nor does anything in the legislative history contradict an intent to encourage children to choose prayer over other alternatives during the moment of silence. Given this legislative history, it is not surprising that the State of Alabama conceded in the

courts below that the purpose of the statute was to make prayer part of daily classroom activity, and that both the District Court and the Court of Appeals concluded that the law's purpose was to encourage religious activity. See *ante*, at 57, n. 44. In light of the legislative history and the findings of the courts below, I agree with the Court that the State intended § 16–1–20.1 to convey a message that prayer was the endorsed activity during the state-prescribed moment of silence.[5] While it is therefore unnecessary also to determine the effect of the statute, *Lynch*, 465 U. S., at 690 (concurring opinion), it also seems likely that the message actually conveyed to objective observers by § 16–1–20.1 is approval of the child who selects prayer over other alternatives during a moment of silence.

Given this evidence in the record, candor requires us to admit that this Alabama statute was intended to convey a message of state encouragement and endorsement of religion. In *Walz* v. *Tax Comm'n*, 397 U. S., at 669, the Court stated that the Religion Clauses of the First Amendment are flexible enough to "permit religious exercise to exist without sponsorship and without interference." Alabama Code § 16–1–20.1 (Supp. 1984) does more than permit prayer to occur during a moment of silence "without interference." It

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[5] THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on the difference between § 16–1–20.1 and its predecessor statute might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." *Post*, at 88. I disagree. In my view, the words "under God" in the Pledge, as codified at 36 U. S. C. § 172, serve as an acknowledgment of religion with "the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future." *Lynch* v. *Donnelly*, 465 U. S. 668, 693 (1984) (concurring opinion).

I also disagree with THE CHIEF JUSTICE's suggestion that the Court's opinion invalidates any moment of silence statute that includes the word "prayer." *Post*, at 85. As noted *supra*, at 73, "[e]ven if a statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives."

endorses the decision to pray during a moment of silence, and accordingly sponsors a religious exercise. For that reason, I concur in the judgment of the Court.

II

In his dissenting opinion, *post*, at 91–106, JUSTICE REHNQUIST reviews the text and history of the First Amendment Religion Clauses. His opinion suggests that a long line of this Court's decisions are inconsistent with the intent of the drafters of the Bill of Rights. He urges the Court to correct the historical inaccuracies in its past decisions by embracing a far more restricted interpretation of the Establishment Clause, an interpretation that presumably would permit vocal group prayer in public schools. See generally R. Cord, Separation of Church and State (1982).

The United States, in an *amicus* brief, suggests a less sweeping modification of Establishment Clause principles. In the Federal Government's view, a state-sponsored moment of silence is merely an "accommodation" of the desire of some public school children to practice their religion by praying silently. Such an accommodation is contemplated by the First Amendment's guarantee that the Government will not prohibit the free exercise of religion. Because the moment of silence implicates free exercise values, the United States suggests that the *Lemon*-mandated inquiry into purpose and effect should be modified. Brief for United States as *Amicus Curiae* 22.

There is an element of truth and much helpful analysis in each of these suggestions. Particularly when we are interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). Whatever the provision of the Constitution that is at issue, I continue to believe that "fidelity to the notion of *constitutional*—as opposed to purely judicial—limits on governmental action requires us to impose a heavy burden on those who claim that practices accepted when [the provision] was

adopted are now constitutionally impermissible." *Tennessee* v. *Garner*, 471 U. S. 1, 26 (1985) (dissenting opinion). The Court properly looked to history in upholding legislative prayer, *Marsh* v. *Chambers*, 463 U. S. 783 (1983), property tax exemptions for houses of worship, *Walz* v. *Tax Comm'n*, *supra*, and Sunday closing laws, *McGowan* v. *Maryland*, 366 U. S. 420 (1961). As Justice Holmes once observed, "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

JUSTICE REHNQUIST does not assert, however, that the drafters of the First Amendment expressed a preference for prayer in public schools, or that the practice of prayer in public schools enjoyed uninterrupted government endorsement from the time of enactment of the Bill of Rights to the present era. The simple truth is that free public education was virtually nonexistent in the late 18th century. See *Abington*, 374 U. S., at 238, and n. 7 (BRENNAN, J., concurring). Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools. Sky, The Establishment Clause, the Congress, and the Schools: An Historical Perspective, 52 Va. L. Rev. 1395, 1403–1404 (1966). Even at the time of adoption of the Fourteenth Amendment, education in Southern States was still primarily in private hands, and the movement toward free public schools supported by general taxation had not taken hold. *Brown* v. *Board of Education*, 347 U. S. 483, 489–490 (1954).

This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. The Court has not done so. See, *e. g.*, *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 212 (1948) (Frank-

furter, J., concurring). When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis. The primary issue raised by JUSTICE REHNQUIST's dissent is whether the historical fact that our Presidents have long called for public prayers of Thanks should be dispositive on the constitutionality of prayer in public schools.[6] I think not. At the very least, Presidential Proclamations are distinguishable from school prayer in that they are received in a noncoercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. See, *e. g.*, *Marsh* v. *Chambers*, *supra*, at 792; *Tilton* v. *Richardson*, 403 U. S., at 686. Although history provides a touchstone for constitutional problems, the Establishment Clause concern for religious liberty is dispositive here.

The element of truth in the United States' arguments, I believe, lies in the suggestion that Establishment Clause analysis must comport with the mandate of the Free Exercise Clause that government make no law prohibiting the free exercise of religion. Our cases have interpreted the Free Exercise Clause to compel the government to exempt persons from some generally applicable government requirements so as to permit those persons to freely exercise their religion. See, *e. g.*, *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U. S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972); *Sherbert* v. *Verner*, 374

[6] Even assuming a taxpayer could establish standing to challenge such a practice, see *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464 (1982), these Presidential Proclamations would probably withstand Establishment Clause scrutiny given their long history. See *Marsh* v. *Chambers*, 463 U. S. 783 (1983).

U. S. 398 (1963). Even where the Free Exercise Clause does not compel the government to grant an exemption, the Court has suggested that the government in some circumstances may voluntarily choose to exempt religious observers without violating the Establishment Clause. See, *e. g.*, *Gillette* v. *United States*, 401 U. S. 437, 453 (1971); *Braunfeld* v. *Brown*, 366 U. S. 599 (1961). The challenge posed by the United States' argument is how to define the proper Establishment Clause limits on voluntary government efforts to facilitate the free exercise of religion. On the one hand, a rigid application of the *Lemon* test would invalidate legislation exempting religious observers from generally applicable government obligations. By definition, such legislation has a religious purpose and effect in promoting the free exercise of religion. On the other hand, judicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause. Any statute pertaining to religion can be viewed as an "accommodation" of free exercise rights. Indeed, the statute at issue in *Lemon*, which provided salary supplements, textbooks, and instructional materials to Pennsylvania parochial schools, can be viewed as an accommodation of the religious beliefs of parents who choose to send their children to religious schools.

It is obvious that either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*, 397 U. S., at 668–669. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. See, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973); *Board of Education* v. *Allen*, 392 U. S. 236 (1968). It is difficult to square any notion of "complete neutrality," *ante*, at 60, with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not

neutral toward religion. See *Welsh* v. *United States*, 398 U. S. 333, 372 (1970) (WHITE, J., dissenting).

The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *supra*, at 76, is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

While this "accommodation" analysis would help reconcile our Free Exercise and Establishment Clause standards, it would not save Alabama's moment of silence law. If we assume that the religious activity that Alabama seeks to protect is silent prayer, then it is difficult to discern any state-imposed burden on that activity that is lifted by Alabama Code § 16–1–20.1 (Supp. 1984). No law prevents a student who is so inclined from praying silently in public schools.

Moreover, state law already provided a moment of silence to these appellees irrespective of § 16–1–20.1. See Ala. Code § 16–1–20 (Supp. 1984). Of course, the State might argue that § 16–1–20.1 protects not silent prayer, but rather group silent prayer under state sponsorship. Phrased in these terms, the burden lifted by the statute is not one imposed by the State of Alabama, but by the Establishment Clause as interpreted in *Engel* and *Abington*. In my view, it is beyond the authority of the State of Alabama to remove burdens imposed by the Constitution itself. I conclude that the Alabama statute at issue today lifts no state-imposed burden on the free exercise of religion, and accordingly cannot properly be viewed as an accommodation statute.

III

The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for voluntary silent prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. The Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer. This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it. In my view, the judgment of the Court of Appeals must be affirmed.

CHIEF JUSTICE BURGER, dissenting.

Some who trouble to read the opinions in these cases will find it ironic—perhaps even bizarre—that on the very day we heard arguments in the cases, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and

the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation—or a moment of silence.

Inevitably some wag is bound to say that the Court's holding today reflects a belief that the historic practice of the Congress and this Court is justified because members of the Judiciary and Congress are more in need of Divine guidance than are schoolchildren. Still others will say that all this controversy is "much ado about nothing," since no power on earth—including this Court and Congress—can stop any teacher from opening the schoolday with a moment of silence for pupils to meditate, to plan their day—or to pray if they voluntarily elect to do so.

I make several points about today's curious holding.

(a) It makes no sense to say that Alabama has "endorsed prayer" by merely enacting a new statute "to specify expressly that voluntary prayer is *one* of the authorized activities during a moment of silence," *ante*, at 77 (O'CONNOR, J., concurring in judgment) (emphasis added). To suggest that a moment-of-silence statute that includes the word "prayer" unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion. For decades our opinions have stated that hostility toward any religion or toward all religions is as much forbidden by the Constitution as is an official establishment of religion. The Alabama Legislature has no more "endorsed" religion than a state or the Congress does when it provides for legislative chaplains, or than this Court does when it opens each session with an invocation to

God. Today's decision recalls the observations of Justice Goldberg:

> "[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it." *Abington School District* v. *Schempp*, 374 U. S. 203, 306 (1963) (concurring opinion).

(b) The inexplicable aspect of the foregoing opinions, however, is what they advance as support for the holding concerning the purpose of the Alabama Legislature. Rather than determining legislative purpose from the face of the statute as a whole,[1] the opinions rely on three factors in concluding that the Alabama Legislature had a "wholly religious" purpose for enacting the statute under review, Ala. Code § 16–1–20.1 (Supp. 1984): (i) statements of the statute's sponsor, (ii) admissions in Governor James' answer to the second amended complaint, and (iii) the difference between § 16–1–20.1 and its predecessor statute.

Curiously, the opinions do not mention that *all* of the sponsor's statements relied upon—including the statement "inserted" into the Senate Journal—were made *after* the legislature had passed the statute; indeed, the testimony that the Court finds critical was given well over a year after the statute was enacted. As even the appellees concede, see Brief for Appellees 18, there is not a shred of evidence that

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[1] The foregoing opinions likewise completely ignore the statement of purpose that accompanied the moment-of-silence bill throughout the legislative process: "To permit a period of silence to be observed *for the purpose* of meditation *or* voluntary prayer at the commencement of the first class of each day in all public schools." 1981 Ala. Senate J. 14 (emphasis added). See also *id.*, at 150, 307, 410, 535, 938, 967.

the legislature as a whole shared the sponsor's motive or that a majority in either house was even aware of the sponsor's view of the bill when it was passed. The sole relevance of the sponsor's statements, therefore, is that they reflect the personal, subjective motives of a single legislator. No case in the 195-year history of this Court supports the disconcerting idea that postenactment statements by individual legislators are relevant in determining the constitutionality of legislation.

Even if an individual legislator's after-the-fact statements could rationally be considered relevant, all of the opinions fail to mention that the sponsor also testified that one of his purposes in drafting and sponsoring the moment-of-silence bill was to clear up a widespread misunderstanding that a schoolchild is legally *prohibited* from engaging in silent, individual prayer once he steps inside a public school building. See App. 53–54. That testimony is at least as important as the statements the Court relies upon, and surely that testimony manifests a permissible purpose.

The Court also relies on the admissions of Governor James' answer to the second amended complaint. Strangely, however, the Court neglects to mention that there was no trial bearing on the constitutionality of the Alabama statutes; trial became unnecessary when the District Court held that the Establishment Clause does not apply to the states.[2] The absence of a trial on the issue of the constitutionality of § 16–1–20.1 is significant because the answer filed by the State Board and Superintendent of Education did not make the same admissions that the Governor's answer made. See 1 Record 187. The Court cannot know whether, if these cases had been tried, those state officials would have offered evidence to contravene appellees' allegations concerning legislative purpose. Thus, it is completely inappropriate to accord any relevance to the admissions in the Governor's answer.

[2]The four days of trial to which the Court refers concerned only the alleged practices of vocal, group prayer in the classroom.

The several preceding opinions conclude that the principal difference between § 16–1–20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in § 16–1–20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole. Such logic—if it can be called that—would lead the Court to hold, for example, that a state may enact a statute that provides reimbursement for bus transportation to the parents of all schoolchildren, but may not *add* parents of parochial school students to an existing program providing reimbursement for parents of public school students. Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." Act of June 14, 1954, Pub. L. 396, 68 Stat. 249. Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method of focusing on the difference between § 16–1–20.1 and its predecessor statute rather than examining § 16–1–20.1 as a whole.[3] Any such holding would of course make a mockery of our decisionmaking in Establishment Clause cases. And even were the Court's method correct, the inclusion of the words "or voluntary prayer" in § 16–1–20.1 is wholly consistent with the clearly permissible purpose of clarifying that silent, voluntary prayer is not *forbidden* in the public school building.[4]

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[3] The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that "our people and our Government [are dependent] upon the moral directions of the Creator." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). If this is simply "acknowledgment," not "endorsement," of religion, see *ante*, at 78, n. 5 (O'CONNOR, J., concurring in judgment), the distinction is far too infinitesimal for me to grasp.

[4] The several opinions suggest that other similar statutes may survive today's decision. See *ante*, at 59; *ante*, at 62 (POWELL, J., concurring); *ante*, at 78, n. 5 (O'CONNOR, J., concurring in judgment). If this is true, these opinions become even less comprehensible, given that the Court

(c) The Court's extended treatment of the "test" of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." "In each [Establishment Clause] case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch* v. *Donnelly*, 465 U. S. 668, 678 (1984). In any event, our responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it.

(d) The notion that the Alabama statute is a step toward creating an established church borders on, if it does not trespass into, the ridiculous. The statute does not remotely threaten religious liberty; it affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect. Without pressuring those who do not wish to pray, the statute simply creates an opportunity to think, to plan, or to pray if one wishes—as Congress does by providing chaplains and chapels. It accommodates the purely private, voluntary religious choices of the individual pupils who wish to pray while at the same time creating a time for nonreligious reflection for those who do not choose to pray. The statute also provides a meaningful opportunity for schoolchildren to appreciate the absolute constitutional right of each individual to worship and believe as the individual wishes. The statute "endorses" only the view that the religious observances of others should be tolerated and,

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holds this statute invalid when there is no legitimate evidence of "impermissible" purpose; there could hardly be less evidence of "impermissible" purpose than was shown in these cases.

where possible, accommodated. If the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the "benevolent neutrality" that we have long considered the correct constitutional standard will quickly translate into the "callous indifference" that the Court has consistently held the Establishment Clause does not require.

The Court today has ignored the wise admonition of Justice Goldberg that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Abington School District* v. *Schempp*, 374 U. S., at 308 (concurring opinion). The innocuous statute that the Court strikes down does not even rise to the level of "mere shadow." JUSTICE O'CONNOR paradoxically acknowledges: "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren." *Ante*, at 73.[5] I would add to that, "even if they choose to pray."

The mountains have labored and brought forth a mouse.[6]

JUSTICE WHITE, dissenting.

For the most part agreeing with the opinion of THE CHIEF JUSTICE, I dissent from the Court's judgment invalidating Ala. Code § 16–1–20.1 (Supp. 1984). Because I do, it is apparent that in my view the First Amendment does not proscribe either (1) statutes authorizing or requiring in so many words a moment of silence before classes begin or (2) a statute that provides, when it is initially passed, for a moment of silence for meditation or prayer. As I read the filed opin-

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[5] The principal plaintiff in this action has stated: "'I probably wouldn't have brought the suit just on the silent meditation or prayer statute . . . . If that's all that existed, that wouldn't have caused me much concern, unless it was implemented in a way that suggested prayer was the preferred activity.'" Malone, Prayers for Relief, 71 A. B. A. J. 61, 62, col. 1 (Apr. 1985) (quoting Ishmael Jaffree).

[6] Horace, Epistles, bk. III (Ars Poetica), line 139.

ions, a majority of the Court would approve statutes that provided for a moment of silence but did not mention prayer. But if a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question "May I pray?" This is so even if the Alabama statute is infirm, which I do not believe it is, because of its peculiar legislative history.

I appreciate JUSTICE REHNQUIST's explication of the history of the Religion Clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause. Of course, I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents.

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947), summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation

between church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).[1]

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian, James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading Member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the Thirteen Colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general Gov-

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[1] *Reynolds* is the only authority cited as direct precedent for the "wall of separation theory." 330 U. S., at 16. *Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law.

ernment carried with it a potential for tyranny. The typical response to this argument on the part of those who favored ratification was that the general Government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the Government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the 11 Colonies which ratified the Constitution by early 1789, 5 proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom. See 3 J. Elliot, Debates on the Federal Constitution 659 (1891); 1 *id.*, at 328. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. 1 *id.*, at 334; 4 *id.*, at 244. Virginia and North Carolina proposed identical guarantees of religious freedom:

> "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and . . . no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 *id.*, at 659; 4 *id.*, at 244.[2]

On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 Annals of Cong. 424. Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of meas-

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[2] The New York and Rhode Island proposals were quite similar. They stated that no particular "religious sect or society ought to be favored or established by law in preference to others." 1 Elliot's Debates, at 328; *id.*, at 334.

ures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. He said, *inter alia:*

> "It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished." *Id.*, at 431–432.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*, at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a Committee of the Whole, and after several weeks' delay were then referred to a Select Committee consisting of Madison and 10 others. The Committee revised Madison's proposal regarding the establishment of religion to read:

> "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the "Annals," and does not seem particularly illuminating. See *id.*, at 729–731. Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency "to abolish religion altogether." Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read "that no religious doctrine shall be established by law." *Id.*, at 729. Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill of Rights—that Congress had no delegated authority to "make religious establishments"—and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."

Madison then spoke, and said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on

the Necessary and Proper Clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit." *Ibid.*

Representative Benjamin Huntington then expressed the view that the Committee's language might "be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it." Huntington, from Connecticut, was concerned that in the New England States, where state-established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.*, at 730–731.

Madison responded that the insertion of the word "national" before the word "religion" in the Committee version should satisfy the minds of those who had criticized the language. "He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." *Id.*, at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that "Congress shall make no laws touching religion, or infringing the rights of conscience." *Ibid.*

Representative Gerry spoke in opposition to the use of the word "national" because of strong feelings expressed during

the ratification debates that a federal government, not a national government, was created by the Constitution. Madison thereby withdrew his proposal but insisted that his reference to a "national religion" only referred to a national establishment and did not mean that the Goverment was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. *Ibid.*

The following week, without any apparent debate, the House voted to alter the language of the Religion Clauses to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789, considered several different forms of the Religion Amendment, and reported this language back to the House:

> "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The House and the Senate both accepted this language on successive days, and the Amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the Members of the

House of the Amendments which became the Bill of Rights, but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.[3] His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter-day commentators have ascribed to him. His explanation on the floor of the meaning of his language—"that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the

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[3] In a letter he sent to Jefferson in France, Madison stated that he did not see much importance in a Bill of Rights but he planned to support it because it was "anxiously desired by others . . . [and] it might be of use, and if properly executed could not be of disservice." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and, *inter alia*, *Engel* v. *Vitale*, 370 U. S. 421 (1962), does not make it any sounder historically. Finally, in *Abington School District* v. *Schempp*, 374 U. S. 203, 214 (1963), the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States" (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.[4] And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether the Government might aid all religions evenhandedly. If one were to follow the advice of JUSTICE BRENNAN, concurring in *Abington School District* v. *Schempp*, *supra*, at 236, and construe the Amendment in the light of what par-

[4] State establishments were prevalent throughout the late 18th and early 19th centuries. See Mass. Const. of 1780, Part 1, Art. III; N. H. Const. of 1784, Art. VI; Md. Declaration of Rights of 1776, Art. XXXIII; R. I. Charter of 1633 (superseded 1842).

ticular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The actions of the First Congress, which reenacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, reenacted the Northwest Ordinance of 1787 and provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n. *(a)*. Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools. 5 Stat. 788; C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 163 (1964).

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clauses which was ultimately proposed and ratified, Representative

Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day Proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." 1 Annals of Cong. 914 (1789). Representative Aedanas Burke objected to the resolution because he did not like "this mimicking of European customs"; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the States knew better than the Congress, and in any event "it is a religious matter, and, as such, is proscribed to us." *Id.*, at 915. Representative Sherman supported the resolution "not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion . . . ." *Ibid.*

Boudinot's resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving Proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clauses; Tucker, who opposed the Thanksgiving Proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness." 1 J. Richardson, Messages and Papers of

the Presidents, 1789–1897, p. 64 (1897). The Presidential Proclamation was couched in these words:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
>
> "And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and

> us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best." *Ibid.*

George Washington, John Adams, and James Madison all issued Thanksgiving Proclamations; Thomas Jefferson did not, saying:

> "Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church.[5] It was not until 1897, when aid to sectarian edu-

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[5] The treaty stated in part:

"*And whereas*, the greater part of said Tribe have been baptized and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." 7 Stat. 79.

From 1789 to 1823 the United States Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren, for propagating the Gospel among the Heathen." See, *e. g.*, ch. 46, 1 Stat. 490. The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. See 1 Stat. 257. In 1833 Congress authorized the State of Ohio to sell the land

cation for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. See Act of June 7, 1897, 30 Stat. 62, 79; cf. *Quick Bear* v. *Leupp*, 210 U. S. 50, 77–79 (1908); J. O'Neill, Religion and Education Under the Constitution 118–119 (1949). See generally R. Cord, Separation of Church and State 61–82 (1982). This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form. 330 U. S., at 15–16.

Joseph Story, a Member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630–632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> . . . . . .
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> "The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent

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set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ." 4 Stat. 618–619.

> any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ." (Footnotes omitted.)

Thomas Cooley's eminence as a legal authority rivaled that of Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

> "But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination

> in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. . . ." *Id.*, at *470–*471.

Cooley added that

> "[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order." *Id.*, at *470.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordaining," such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of a historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been

true; in the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities,[6] have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Tilton* v. *Richardson*, 403 U. S. 672, 677–678, (1971); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984).

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proved all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," *ante*, at 52, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

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[6] *Tilton* v. *Richardson* 403 U. S. 672, 677 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (partial); *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736 (1976); *Wolman* v. *Walter*, 433 U. S. 229 (1977).

Many of our other Establishment Clause cases have been decided by bare 5–4 majorities. *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980); *Larson* v. *Valente*, 456 U. S. 228 (1982); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Lynch* v. *Donnelly*, 465 U. S. 668 (1984); cf. *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U. S. 472 (1973).

The Court has more recently attempted to add some mortar to *Everson*'s wall through the three-part test of *Lemon* v. *Kurtzman*, *supra*, at 614–615, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion.

Lemon cited *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968), as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. See *Allen*, *supra*, at 243. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proved mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so. *Larson* v. *Valente*, 456 U. S. 228, 262–263 (1982) (WHITE, J., dissenting).

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as

textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld. *E. g., Allen, supra.*

The entanglement prong of the *Lemon* test came from *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970). *Walz* involved a constitutional challenge to New York's time-honored practice of providing state property tax exemptions to church property used in worship. The *Walz* opinion refused to "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history," *id.*, at 671, and upheld the tax exemption. The Court examined the historical relationship between the State and church when church property was in issue, and determined that the challenged tax exemption did not so entangle New York with the church as to cause an intrusion or interference with religion. Interferences with religion should arguably be dealt with under the Free Exercise Clause, but the entanglement inquiry in *Walz* was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz*' reflective inquiry into entanglement, however. *E. g., Wolman, supra,* at 254. One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). For example, in *Wolman, supra,* the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision

of sectarian officials in charge of field trips would be too onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test as applied in cases like *Wolman* also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, see n. 6, *supra*, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[7] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[8] A State may lend textbooks on American colonial history, but it may not lend a film on

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[7] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

[8] *Meek*, 421 U. S., at 362–366. A science book is permissible, a science kit is not. See *Wolman*, 433 U. S., at 249.

George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[9] A State may pay for bus transportation to religious schools[10] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[11] A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, *Meek* v. *Pittenger*, 421 U. S. 349, 367, 371 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. *Wolman*, 433 U. S., at 241. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[12] such as in a trailer parked down the street. *Id.*, at 245. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services,[13] but it may not provide funds for teacher-prepared tests on secular subjects.[14] Religious instruction may not be given in public school,[15] but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[16]

These results violate the historically sound principle "that the Establishment Clause does not forbid governments . . . to [provide] general welfare under which benefits are distributed to private individuals, even though many of those indi-

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[9] See *Meek*, *supra*, at 354–355, nn. 3, 4, 362–366.

[10] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

[11] *Wolman*, *supra*, at 252–255.

[12] *Wolman*, *supra*, at 241–248; *Meek*, *supra*, at 352, n. 2, 367–373.

[13] *Regan*, 444 U. S., at 648, 657–659.

[14] *Levitt*, 413 U. S., at 479–482.

[15] *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

[16] *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

viduals may elect to use those benefits in ways that 'aid' religious instruction or worship." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 799 (1973) (BURGER, C. J., concurring in part and dissenting in part). It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.

Although the test initially provided helpful assistance, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672 (1971), we soon began describing the test as only a "guideline," *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, and lately we have described it as "no more than [a] useful signpos[t]." *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983), citing *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). We have noted that the *Lemon* test is "not easily applied," *Meek*, *supra*, at 358, and as JUSTICE WHITE noted in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646 (1980), under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U. S., at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it. 465 U. S., at 679, citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Larson* v. *Valente*, 456 U. S. 228 (1982).

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," *ante*, at 52, has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon* v. *Kurtzman*." *Regan*, *supra*, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. *Tilton*, *supra*. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. See *Walz*, 397 U. S., at 671–673; see also *Lynch*, *supra*, at 673–678. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute because the State wished to "characterize prayer as a favored practice." *Ante*, at 60. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in

the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals.

Syllabus

ATKINS, COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE *v.* PARKER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 83–1660. Argued November 27, 1984—Decided June 4, 1985*

In 1981, Congress amended the Food Stamp Act to reduce from 20 percent to 18 percent the earned-income disregard used in computing eligibility for food stamps. Thereafter, the Massachusetts Department of Public Welfare (Department) mailed a notice to all food-stamp recipients in the State with earned income advising them that the reduction in the earned-income disregard might result in either a reduction or termination of their benefits, that they had a right to request a hearing, and that their benefits would be reinstated if a hearing was requested within 10 days of the notice. Petitioners in No. 83–6381 (hereafter petitioners), recipients of the notice, brought a class action in Federal District Court, alleging that the notice was inadequate and seeking injunctive relief. After the court issued a temporary injunction, the Department sent a second notice similar to but somewhat more extensive than the first notice. Petitioners also attacked the adequacy of this notice. The court again ruled in petitioners' favor and held that the notice violated the Due Process Clause of the Fourteenth Amendment. The Court of Appeals agreed.

Held:

1. The second notice complied with the statute and regulations. The relevant language of 7 U. S. C. § 2020(e)(10)—which does not itself mandate any notice at all but merely assumes that a hearing request by a household aggrieved by a state agency's action will be preceded by "individual notice of agency action"—cannot be fairly construed as a command to give notice of a general change in the law. The legislative history does not suggest that Congress intended to eliminate the distinction between requiring advance notice of an "adverse action" based on the particular facts of an individual case and the absence of any requirement of individual notice of a "mass change" in the law. And the notice in question complied with the applicable regulation requiring individual

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*Together with No. 83–6381, *Parker et al.* v. *Block, Secretary of Agriculture, et al.*, also on certiorari to the same court.

notices of a "mass change" but not an adverse action notice when benefits are reduced or terminated as a result of a "mass change." Pp. 123–127.

2. The second notice did not violate the Due Process Clause. Pp. 127–131.

(a) Even if it is assumed that the mass change increased the risk of erroneous reductions in benefits, that assumption does not support the claim that the notice was inadequate. The notice plainly informed each household of the opportunity to request a fair hearing and the right to have its benefit level frozen if a hearing was requested. Pp. 127–128.

(b) This case does not concern the procedural fairness of individual eligibility determinations, but rather involves a legislatively mandated substantive change in the scope of the entire food-stamp program. The procedural component of the Due Process Clause does not impose a constitutional limitation on Congress' power to make such a change. A welfare recipient is not deprived of due process when Congress adjusts benefit levels; the legislative process provides all the process that is due. Here, the participants in the food-stamp program had no greater right to advance notice of the change in the law than did any other voters. Because the substantive reduction in the level of petitioners' benefits was the direct result of the statutory amendment, they have no basis for challenging the procedure that caused them to receive a different, less valuable property interest after the amendment became effective. As a matter of constitutional law, there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Pp. 128–131.

722 F. 2d 933, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in Part I of which MARSHALL, J., joined, *post*, p. 132. MARSHALL, J., filed a dissenting opinion, *post*, p. 157.

Samuel A. Alito argued the cause for the federal respondent in No. 83–6381 in support of petitioner in No. 83–1660. With him on the briefs were *Solicitor General Lee, Acting Assistant Attorney General Willard, Deputy Solicitor General Geller, Leonard Schaitman,* and *Bruce G. Forrest. Ellen L. Janos,* Assistant Attorney General of Massachusetts, argued the cause for petitioner in No. 83–1660. With her on the briefs were *Francis X. Bellotti,* Attorney General,

and *E. Michael Sloman* and *Carl Valvo*, Assistant Attorneys General.

Steven A. Hitov argued the cause for Parker et al. in both cases. With him on the briefs was *J. Paterson Rae*.†

JUSTICE STEVENS delivered the opinion of the Court.

In November, and again in December 1981, the Massachusetts Department of Public Welfare mailed a written notice to over 16,000 recipients advising them that a recent change in federal law might result in either a reduction or a termination of their food-stamp benefits. The notice did not purport to explain the precise impact of the change on each individual recipient. The question this case presents is whether that notice violated any federal statute or regulation, or the Due Process Clause of the Fourteenth Amendment. Unlike the District Court and the Court of Appeals, we conclude that there was no violation.

In an attempt to "permit low-income households to obtain a more nutritious diet through normal channels of trade,"[1] Congress created a federally subsidized food-stamp program. The Secretary of Agriculture prescribes the standards for eligibility for food stamps,[2] but state agencies are authorized to make individual eligibility determinations and to distribute the food stamps to eligible households, which may use them to purchase food from approved, retail food stores.[3] The eligibility of an individual household, and the amount of its food-

†*Neil Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Bronson C. La Follette*, Attorney General of Wisconsin, and *F. Thomas Creeron III*, Assistant Attorney General, filed a brief for the State of Illinois et al. as *amici curiae* urging reversal.

Cynthia G. Schneider filed a brief for the National Anti-Hunger Coalition as *amicus curiae* urging affirmance.

Kenneth O. Eikenberry, Attorney General, and *Charles F. Murphy*, Assistant Attorney General, filed a brief for the State of Washington as *amicus curiae*.

[1] 7 U. S. C. § 2011.

[2] § 2014.

[3] §§ 2013(a), 2020(a).

stamp allotment, are based on several factors, including the size of the household and its income.[4] Certifications of eligibility expire periodically and are renewed on the basis of applications submitted by the households.[5]

Prior to 1981, federal law provided that 20 percent of the household's earned income should be deducted, or disregarded, in computing eligibility.[6] The purpose of the earned-income disregard was to maintain the recipients' incentive to earn and to report income. In 1981 Congress amended the Food Stamp Act to reduce this deduction from 20 percent to 18 percent.[7] That amendment had no effect on households with no income or with extremely low income, but caused a reduction of benefits in varying amounts, or a complete termination of benefits, for families whose income placed them close to the border between eligibility and ineligibility.[8]

On September 4, 1981, the Department of Agriculture issued regulations providing for the implementation of the change in the earned-income disregard and directing the States to provide notice to food-stamp recipients.[9] That directive indicated that the form of the notice might comply with the regulations dealing with so-called "mass changes,"[10]

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[4] § 2014.

[5] §§ 2012(c), 2014(f), 2015(c).

[6] § 2014(e) (1976 ed., Supp. II).

[7] See 95 Stat. 360, 7 U. S. C. § 2014(e).

[8] The Government states that it is "advised that the reductions involved did not exceed $6 per month for a four-member household if the household remained eligible for benefits." Brief for Federal Respondent 7. It does not indicate where in the record this information is located; nor does it indicate the source of the "advice."

[9] 46 Fed. Reg. 44722 (1981). The regulation provided that the change should begin no later than 90 days from the date of implementation, with October 1, 1981, as the last date for state agencies to begin implementation (absent a waiver).

[10] *Ibid.* The portion of 7 CFR § 273.12(e) (1985), which discusses the notice required for mass changes, provides in relevant part:

"(e) *Mass changes.* Certain changes are initiated by the State or Federal government which may affect the entire caseload or significant

rather than with the regulations dealing with individual "adverse actions."[11]

In November, the Massachusetts Department of Public Welfare (Department) mailed a brief, ambiguously dated notice to all food-stamp recipients with earned income advising them that the earned-income deduction had been lowered from 20 percent to 18 percent and that the change would result in either a reduction or a termination of their benefits. The notice was printed on a card, in English on one side and Spanish on the other. The notice stated that the recipient had a right to request a hearing "if you disagree with this action," and that benefits would be reinstated if a hearing was requested within 10 days of the notice.[12]

On December 10, 1981, petitioners in No. 83–6381 commenced this action on behalf of all Massachusetts households

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portions of the caseload. These changes include adjustments to the income eligibility standards, the shelter and dependent care deductions, the Thrifty Food Plan, and the standard deduction; annual and seasonal adjustments to Social Security, SSI, and other Federal benefits, periodic adjustments to AFDC or GA payments; and other changes in the eligibility criteria based on legislative or regulatory actions.

. . . . . .

"(2) . . . (ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

[11] The section on adverse actions, 7 CFR § 273.13 (1985), provides in relevant part:

"(a) *Use of notice.* Prior to any action to reduce or terminate a household's benefits within the certification period, the State agency shall, except as provided in paragraph (b) of this section, provide the household timely and adequate advance notice before the adverse action is taken."

. . . . . .

"(b) *Exemptions from notice.* Individual notices of adverse action are not required when:

"(1) The State initiates a mass change as described in § 273.12(e)."

[12] App. to Pet. for Cert. in No. 83–1660, pp. A. 44–A. 45; App. 3.

that had received the notice. They alleged that the notice was inadequate as a matter of law and moved for a temporary restraining order. On December 16, 1981, after certifying the action as a class action, and after commenting that the "notice was deficient in that it failed to provide recipients with a date to determine the time in which they could appeal," the District Court enjoined the Department from reducing or terminating any benefits on the basis of that notice.[13]

The Department, in compliance with the District Court's order, mailed supplemental benefits for the month of December to each of the 16,640 class members. It then sent out a second notice, in English and Spanish versions, dated December 26, which stated in part:

"* * * *IMPORTANT NOTICE—READ CAREFULLY* * * *

"RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR:364.400).

"*YOUR RIGHT TO A FAIR HEARING:*

"YOU HAVE THE RIGHT TO REQUEST A FAIR HEARING IF YOU DISAGREE WITH THIS AC-

[13] App. to Pet. for Cert. in No. 83–1660, pp. A. 45–A. 46.

TION. IF YOU ARE REQUESTING A HEARING, YOUR FOOD STAMP BENEFITS WILL BE REINSTATED. . . . IF YOU HAVE QUESTIONS CONCERNING THE CORRECTNESS OF YOUR BENEFITS COMPUTATION OR THE FAIR HEARING PROCESS, CONTACT YOUR LOCAL WELFARE OFFICE. YOU MAY FILE AN APPEAL AT ANY TIME IF YOU FEEL THAT YOU ARE NOT RECEIVING THE CORRECT AMOUNT OF FOOD STAMPS."[14]

Petitioners filed a supplemental complaint attacking the adequacy of this notice, and again moved for a preliminary injunction. In October 1982, the District Court consolidated the hearing on that motion with the trial on the merits and again ruled in petitioners' favor. The District Court found that there was a significant risk of error in the administration of the food-stamp program, particularly with the implementation of the change in the earned-income disregard, and that the failure to provide each recipient with an adequate notice increased the risk of error. In essence, the District Court concluded that the December notice was defective because it did not advise each household of the precise change in its benefits, or with the information necessary to enable the recipient to calculate the correct change; because it did not tell recipients whether their benefits were being reduced or terminated; and because the reading level and format of the notice made it difficult to comprehend.[15] Based on the

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[14] App. 5. Each recipient was provided with a card that he could mail to obtain a hearing; a recipient could also obtain a hearing by placing a telephone call or by asking for a hearing in person. App. to Pet. for Cert. in No. 83–1660, p. A. 48.

[15] *Id.*, at A. 100. The District Court wrote:

"The risk of erroneous deprivation of benefits is increased in this case by the lack of adequate notice. The December notice did not inform the affected food stamp households of the exact action being taken, that is, whether their food stamp allotment was being reduced or terminated. There was no mention of the amount by which the benefits were being re-

premise that the statutorily mandated reduction or termination of benefits was a deprivation of property subject to the full protection of the Fourteenth Amendment,[16] the court held that the Due Process Clause had been violated.[17]

As a remedy, the District Court ordered the Department "to return forthwith to each and every household in the plaintiff class all food stamp benefits lost as a result of the action taken pursuant to the December notice" between January 1, 1981, and the date the household received adequate notice, had its benefits terminated for a reason unrelated to the change in the earned-income disregard, or had its file recertified.[18] The District Court also ordered that all future food-stamp notices issued by the Department contain various data, including the old and new benefit amounts, and that the Department issue regulations, subject to court approval, governing the form of future food-stamp notices.[19]

The United States Court of Appeals for the First Circuit agreed with the District Court's constitutional holding, indi-

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duced. And finally, the December notice lacked the information necessary to enable the household to determine if an error had been made. Therefore, without the relevant information to determine whether an error had been made, the risk of an erroneous deprivation is increased." *Id.*, at A. 90–A. 91.

[16] The District Court concluded:

"It is clear that the entitlement to food stamps benefits is a property interest subject to the full protection of the Fourteenth Amendment. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970). Therefore, given the existence of a constitutionally protected property interest, the question is what process is due." *Id.*, at A. 86.

[17] The District Court also held that the December notice violated the timely notice requirements of 7 U. S. C. § 2020(e)(10) and 7 CFR § 273.12(e)(2)(ii) (1985), App. Pet. for Cert. in No. 83-1660, p. A. 98; that the notice required to implement the earned-income disregard had to comport with 7 CFR § 273.13(a) (1985), App. to Pet. for Cert. in No. 83-1660, p. A. 98, and that the notice violated multilingual notice requirements, *id.*, at A. 104–A. 105.

[18] *Id.*, at A. 101.

[19] *Id.*, at A. 102–104.

cated its belief that Congress could not have "intended a constitutionally deficient notice to satisfy the statutory notice requirement," and thus affirmed the District Court's holding that "the December notice failed to satisfy the notice requirements of 7 U. S. C. § 2020(e)(10) and 7 CFR § 273.12(e)(2)(ii)." *Foggs* v. *Block*, 722 F. 2d 933, 939–940 (1983).[20] The Court of Appeals held, however, that the District Court had erred in ordering a reinstatement of benefits and in specifying the form of future notices.[21]

Petitioners in No. 83–6381 sought review of the Court of Appeals' modification of the District Court's remedy, and the Department, in No. 83–1660, cross-petitioned for a writ of certiorari seeking review of the holding on liability. We granted both the petition and the cross-petition, and invited the Solicitor General to participate in the argument. 467 U. S. 1250 (1984). We conclude that the notice was lawful, and therefore have no occasion to discuss the remedy issue that the petition in No. 83–6381 presents. Because there would be no need to decide the constitutional question if we found a violation of either the statute or the regulations,[22] we first consider the statutory issue.

I

The only reference in the Food Stamp Act to a notice is contained in § 2020(e), which outlines the requirements of a state plan of operation. Subsection (10) of that section provides that a state plan must grant a fair hearing, and a prompt determination, to any household that is aggrieved by

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[20] However, the Court of Appeals disagreed that the December notice failed to satisfy the notice requirements of 7 CFR § 273.13(a) (1985). *Foggs* v. *Block*, 722 F. 2d, at 940.

[21] *Id.*, at 941.

[22] *Escambia County, Florida* v. *McMillan*, 466 U. S. 48, 51 (1984) *(per curiam)* ("normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case"); *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

the action of a state agency. A proviso to that subsection states that any household "which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits" shall continue to receive the same level of benefits until the hearing is completed.[23]

The language of the proviso does not itself command that any notice be given, but it does indicate that Congress assumed that individual notice would be an element of the fair-hearing requirement. Thus, whenever a household is entitled to a fair hearing, it is appropriate to read the statute as imposing a requirement of individual notice that would enable the household to request such a hearing. The hearing requirement, and the incidental reference to "individual notice," however, are by their terms applicable only to "agency action reducing or terminating" a household's benefits. Therefore, it seems unlikely that Congress contemplated individual hearings for every household affected by a general change in the law.

The legislative history of § 2020(e)(10) sheds light on its meaning. As originally enacted in 1964, the Food Stamp Act contained no fair-hearing requirement. See 78 Stat. 703–709. In 1971, however, in response to this Court's deci-

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[23] Title 7 U. S. C. § 2020(e)(10) provides, in relevant part:

"The State plan of operation . . . shall provide . . .

. . . . . .

"(10) for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation as it affects the participation of such household in the food stamp program or by a claim against the household for an overissuance: *Provided*, That any household which timely requests such a fair hearing after receiving individual notice of agency action reducing or terminating its benefits within the household's certification period shall continue to participate and receive benefits on the basis authorized immediately prior to the notice of adverse action until such time as the fair hearing is completed and an adverse decision rendered or until such time as the household's certification period terminates, whichever occurs earlier . . . ."

sion in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), Congress amended the Act to include a fair-hearing provision,[24] and in the Food Stamp Act of 1977, § 2020(e)(10) was enacted in its present form.[25] The legislative history of the Food Stamp Act of 1977 contains a description of the then-existing regulations, which were promulgated after the 1971 amendment, and which drew a distinction between the requirement of notice in advance of an "adverse action" based on the particular facts of an individual case, on the one hand, and the absence of any requirement of individual notice of a "mass change," on the other.[26] That history contains no suggestion that Congress intended to eliminate that distinction; to the contrary, Congress expressly recognized during the period leading to the enactment of the Food Stamp Act of 1977 the distinction between the regulatory requirement regarding notice in the case of an adverse action and the lack of such a requirement in the case of a mass change.[27] Read against this background, the relevant statutory language—which does not

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[24] 84 Stat. 2051; see H. R. Rep. No. 95–464, pp. 285–286 (1977); 7 U. S. C. § 2019(e)(8) (1976 ed.) (state agency must provide "for the granting of a fair hearing and a prompt determination thereafter to any household aggrieved by the action of a State agency").

[25] 91 Stat. 972.

[26] See H. R. Rep. No. 95–464, at 285–289 (summarizing the existing rules governing fair hearings).

[27] *Id.*, at 289 ("The Committee bill would retain the fair hearings provision of the law intact and would encourage the Department to enforce its excellent regulations and instructions on the subject. . . . The Department should also be certain that, although its regulations do not require individual notice of adverse action when mass changes in program benefits are proposed, they should require the states to send precisely such notices well in advance when the massive changes mandated by this bill are about to be implemented so that the individuals affected are fully aware of precisely why their benefits are being adversely affected. Hearings would, of course, be unnecessary in the absence of claims of factual error in individual benefit computation and calculation. All states should be overseen to be certain that their individual notices in non-mass change adverse action contexts recite the household's fair hearing request rights").

itself mandate any notice at all but merely assumes that a request for a hearing will be preceded by "individual notice of agency action"—cannot fairly be construed as a command to give notice of a general change in the law.[28]

Nor can we find any basis for concluding that the December notice failed to comply with the applicable regulations. Title 7 CFR § 273.12(e)(2)(ii) (1984) provides:

> "(ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

This regulation reflects the familiar distinction between an individual adverse action and a mass change. The statement that a notice of adverse action is not required when a change of benefits results from a mass change surely implies that individual computations are not required in such cases. The two requirements that are imposed when a mass change occurs are: (1) that "individual" notice be sent and (2) that it "inform them of the change." In this case, a separate individual notice was sent to each individual household and it did "inform them of the change" in the program that Congress had mandated. Since the word "change" in the regulation

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[28] Prior to the enactment of the Food Stamp Act of 1977, although individual notices of adverse action were not required by the regulations when mass changes in benefits were instituted because of changes in the law affecting, among other items, income standards or other eligibility criteria, see 7 CFR § 271.1(n)(2)(i) (1975), the States were required to "publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with [food stamp allotment] cards and with notices placed in food stamp and welfare offices." § 271.1(n)(3); see also 39 Fed. Reg. 25996 (1974).

plainly refers to the "mass change," the notice complied with the regulation.[29]

II

Since the notice of the change in the earned-income disregard was sufficient under the statute and under the regulations, we must consider petitioners' claim that they had a constitutional right to advance notice of the amendment's specific impact on their entitlement to food stamps before the statutory change could be implemented by reducing or terminating their benefits. They argue that an individualized calculation of the new benefit was necessary in order to avoid the risk of an erroneous reduction or termination.

The record in this case indicates that members of petitioners' class had their benefits reduced or terminated for either or both of two reasons: (1) because Congress reduced the earned-income disregard from 20 percent to 18 percent; or (2) because inadvertent errors were made in calculating benefits. These inadvertent errors, however, did not necessarily result from the statutory change, but rather may have been attributable to a variety of factors that can occur in the administration of any large welfare program.[30] For ex-

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[29] It may well be true, as petitioners argue, that the computerized data in the Department's possession made it feasible for the agency to send an individualized computation to each recipient, and that such a particularized notice would have served the Commonwealth's interest in minimizing or correcting predictable error. What judges may consider common sense, sound policy, or good administration, however, is not the standard by which we must evaluate the claim that the notice violated the applicable regulations.

Moreover, present regulations protect the food-stamp household by providing, upon request, the ongoing right to access to information and materials in its case file. 7 CFR § 272.1(c)(2) (1985). Further, upon request, specific materials are made available for determining whether a hearing should be requested, § 273.15(i)(1). If a hearing is requested, access to information and materials concerning the case must be made available prior to the hearing and during the hearing, § 273.15(p)(1).

[30] See App. to Pet. for Cert. in No. 83–1660, pp. A. 50–A. 52 (Cecelia Johnson), A. 53 (Gill Parker), A. 55 (Stephanie Zades), A. 55–A. 56

ample, each of the named petitioners, presumably representative of the class, see Fed. Rule Civ. Proc. 23(a), appealed a reduction in benefits. None identified an error resulting from the legislative decision to change the earned-income disregard. But even if it is assumed that the mass change increased the risk of erroneous reductions in benefits, that assumption does not support the claim that the actual notice used in this case was inadequate. For that notice plainly informed each household of the opportunity to request a fair hearing and the right to have its benefit level frozen if a hearing was requested. As the testimony of the class representatives indicates, every class member who contacted the Department had his or her benefit level frozen, and received a fair hearing, before any loss of benefit occurred. Thus, the Department's procedures provided adequate protection against any deprivation based on an unintended mistake. To determine whether the Constitution required a more detailed notice of the mass change, we therefore put the miscellaneous errors to one side and confine our attention to the reductions attributable to the statutory change.

Food-stamp benefits, like the welfare benefits at issue in *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), "are a matter of statutory entitlement for persons qualified to receive them." *Id.*, at 262 (footnote omitted). Such entitlements are appropriately treated as a form of "property" protected by the Due Process Clause; accordingly, the procedures that are employed in determining whether an individual may continue to participate in the statutory program must comply with the commands of the Constitution. *Id.*, at 262–263.[31]

(Madeline Jones). By hypothesis, an inadvertent error is one that the Department did not anticipate; for that reason, the Department could not give notice of a reduction that was simply the consequence of an unintended mistake.

[31] Thus, in *Mathews* v. *Eldridge*, 424 U. S. 319, 332 (1976), this Court wrote:

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the

This case, however, does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program. Such a change must, of course, comply with the substantive limitations on the power of Congress, but there is no suggestion in this case that the amendment at issue violated any such constraint. Thus, it must be assumed that Congress had plenary power to define the scope and the duration of the entitlement to food-stamp benefits, and to increase, to decrease, or to terminate those benefits based on its appraisal of the relative importance of the recipients' needs and the resources available to fund the program. The procedural component of the Due Process Clause does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits." *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971).

The congressional decision to lower the earned-income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement in 1982 than they had received in 1981. But the 1981 entitlement did not include any right to have the program continue indefinitely at the same level, or to phrase it another way, did not include any right to the maintenance of the same level of property entitlement. Before the statutory change became effective, the existing property entitlement did not qualify the legislature's power to substitute a different, less valuable entitlement at a later date. As we have frequently noted: "[A] welfare recipient is not deprived of due process when the legislature

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meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. The Secretary does not contend that procedural due process is inapplicable to terminations of Social Security disability benefits. He recognizes, as has been implicit in our prior decisions, *e. g.*, *Richardson* v. *Belcher*, 404 U. S. 78, 80–81 (1971); *Richardson* v. *Perales*, 402 U. S. 389, 401–402 (1971); *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960), that the interest of an individual in continued receipt of these benefits is a statutorily created 'property' interest protected by the Fifth Amendment."

adjusts benefit levels. . . . [T]he legislative determination provides all the process that is due."[32]

The participants in the food-stamp program had no greater right to advance notice of the legislative change—in this case, the decision to change the earned-income disregard level—than did any other voters.[33] They do not claim that there was any defect in the legislative process. Because the substantive reduction in the level of petitioners' benefits was the direct consequence of the statutory amendment, they have no basis for challenging the procedure that caused them to receive a different, less valuable property interest after the amendment became effective.

The claim that petitioners had a constitutional right to better notice of the consequences of the statutory amendment is without merit. All citizens are presumptively charged with knowledge of the law, see, *e. g.*, *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925). Arguably that presumption may be overcome in cases in which the statute does not allow a sufficient "grace period" to provide the persons affected by a change in the law with an adequate opportunity to become familiar with their obligations under it. See *Texaco, Inc.* v. *Short*, 454 U. S. 516, 532 (1982). In this case, however, not only was there a grace period of over 90

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[32] *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432–433 (1982); see also *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 174 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U. S. 572, 575 (1979); *Flemming* v. *Nestor*, 363 U. S. 603, 608–611 (1960).

[33] Cf. *Bi-Metallic Investment Co.* v. *State Bd. of Equalization*, 239 U. S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").

days before the amendment became effective, but in addition, every person affected by the change was given individual notice of the substance of the amendment.[34]

As a matter of constitutional law there can be no doubt concerning the sufficiency of the notice describing the effect of the amendment in general terms. Surely Congress can presume that such a notice relative to a matter as important as a change in a household's food-stamp allotment would prompt an appropriate inquiry if it is not fully understood. The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies that affect his destiny. To contend that this notice was constitutionally insufficient is to reject that premise.[35]

The judgment of the Court of Appeals is reversed.

It is so ordered.

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[34] Thus, even under the position espoused in dissent in *Texaco*, there would be no merit to the claim in this case. As JUSTICE BRENNAN wrote: "As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law. But an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption. If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons of substantial interests in property, an enactment that relies on that presumption of knowledge must evidence some rational accommodation between the interests of the State and fairness to those against whom the law is applied." 454 U. S., at 544.

[35] In the case before us, the constitutional claim is particularly weak because the relevant regulations provided that any recipient who claimed that his benefit had been improperly computed as a result of the change in the income deduction was entitled to a reinstatement of the earlier benefit level pending a full individual hearing. 7 CFR § 273.12(e)(2)(ii) (1985). Petitioners do not contend that there was a failure to comply with this regulation. This, of course, would be a different case if the reductions were based on changes in individual circumstances, or if the reductions were based on individual factual determinations, and notice and an opportunity to be heard had been denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins as to Part I, dissenting.

When the Massachusetts Department of Public Welfare (Department) implemented the 1981 statutory reduction in food stamp benefits for persons with earned income, it sent out form notices telling over 16,000 recipients that their benefits would be "reduced . . . or . . . terminated" without specifying which. App. 5. The notices contained no information about any particular recipient's case. The District Court declared the notices unlawful under the Due Process Clause as well as the relevant regulation and statute "because . . . [they] did not contain the individual recipient's old food stamp benefit amount, new benefit amount, or the amount of earned income that was being used to compute the change."[1] The Court of Appeals agreed, finding the notices statutorily and "constitutionally deficient" because they "failed to inform." *Foggs* v. *Block*, 722 F. 2d 933, 940 (CA1 1983). The Court today reverses, finding that "individual computations" are not required by regulation, statute, or Constitution. *Ante*, at 126. I disagree with the Court's interpretation of all three authorities. Accordingly, I dissent.

I

Title 7 CFR § 273.12(e)(2)(ii) (1985) requires that "when a household's food stamp benefits are reduced or terminated as a result of a mass change . . . [s]tate agencies shall send individual notices to households to inform them of the change."[2]

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[1] Order, *Foggs* v. *Block*, No. 81–0365–F, p. 2 (Mass., Mar. 24, 1982), reprinted in App. to Pet. for Cert. in No. 83–1660, p. 100 (hereinafter Pet. App.).

[2] The regulation provides in full:

"A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. If a household requests a fair hearing, benefits shall be continued at the former level only if the issue being appealed is that food stamp eligibility or benefits were improperly computed."

When Congress reduced the statutory earned-income deduction in 1981, the Secretary of Agriculture ordered state agencies implementing the change to provide the "individual notices" required by this regulation. 46 Fed. Reg. 44722 (1981). Both courts below held, however, that the vague form notices in this case failed to fulfill the "individual notice" requirement. 722 F. 2d, at 940; Pet. App. 98. Although the phrase apparently has never been administratively defined,[3] I believe the logic of the regulation, as well as its history and evident function in the administrative scheme, requires inclusion of precisely the sort of individualized information found necessary by the District Court.

First, the sentence in § 273.12(e)(2)(ii) that requires "individual notices" of mass changes is immediately followed by a second requirement:

> "If a household requests a fair hearing [after receiving a mass change notice], benefits shall be continued at the former level *only if the issue being appealed is that food stamp eligibility or benefits were improperly computed.*" 7 CFR § 273.12(e)(2)(ii) (1985) (emphasis added).

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[3] The record contains no evidence that food stamp program authorities have ever advanced a particular construction of the phrase prior to this litigation. Indeed, in his opening brief to this Court, the Secretary did not address the regulatory argument, but contended instead that "any argument, independent of the constitutional argument, that the Massachusetts notice was in violation of the Food Stamp Act or the 'mass change' regulations" should be left open to the recipients on remand. Brief for Federal Respondent 44, n. 38. Thus the Secretary's position on the meaning of the "individual notice" regulation was not presented until his reply brief was filed. Because this interpretation apparently has been developed *pendente lite*, the normal canon requiring deference to regulatory interpretations made by an agency that administers a statute, *e. g.*, *Jewett* v. *Commissioner*, 455 U. S. 305, 318 (1982), has no application here. See *Motor Vehicle Mfrs. Assn.* v. *State Farm Mutual Automobile Ins. Co.*, 463 U. S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action"); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 422 (1971) (opinion of Black, J.) (rejecting "too-late formulations, apparently coming from the Solicitor General's office").

The Court quotes this language, *ante*, at 126, and then ignores it. It seems apparent, however, that an aggrieved food stamp recipient cannot possibly contend in good faith, let alone demonstrate, that his request for a hearing is based on a claim that his benefits have been "improperly computed" if the only notice he receives tells him nothing at all about the computation or new amount of the benefit.[4] Moreover, state agencies cannot possibly exercise their discretion under this regulation to decide not to continue benefits if the requestor cannot rationally specify his appeal grounds.[5] Unless this final provision of the mass change regulation at issue is to be rendered effectively meaningless, the individual notices mandated for a mass change must include the minimum of individualized data necessary for a recipient to surmise, at least, that his benefits have been miscalculated. That minimum amount of data is all that the District Court required in these cases.[6]

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[4] As the Court of Appeals noted, "[t]hese recipients may have been well informed about their right to appeal, but they did not have enough information to know whether or not to exercise that right." *Foggs* v. *Block*, 722 F. 2d 933, 939 (CA1 1983).

[5] Similar delegations of authority elsewhere in the food stamp regulations are likewise called into question by the Court's ruling today. See 7 CFR § 273.15(k)(1) (1985) ("When benefits are reduced or terminated due to a mass change, participation on the prior basis shall be reinstated only if the issue being contested is that food stamp . . . benefits were improperly computed or that Federal law or regulation is being misapplied or misinterpreted by the State agency"); § 271.7(f) ("State agencies shall not be required to hold fair hearings unless the request for a fair hearing is based on a household's belief that its benefit level was computed incorrectly . . . or that the rules were misapplied or misinterpreted").

[6] Apart from its discussion of the regulation, the Court emphasizes the fact that the form notice mailed by the Department in these cases informed recipients that "[y]ou have the right to request a fair hearing if you disagree with this action." *Ante*, at 128. It seems relatively clear, however, that under 7 CFR § 273.15(k)(2)(ii) (1985) and, perhaps, § 271.7(f), aggrieved households have no "right" to a hearing based merely on disagreement with a change in the law. Perhaps the Court intends either to limit its approval of form notices to circumstances in which a state agency allows appeals and fair hearings no matter what the reason, or to require that ap-

A careful examination of the history of § 273.12(e)(2)(ii) also suggests that "individual notices" mean notices containing some individualized information. The Secretary's food stamp regulations originally required that, "[p]rior to *any* action to terminate or reduce a household's program benefits," state agencies had to give each household "in detail the reasons for the proposed action." 7 CFR § 271.1(n) (1972) (emphasis added). This notice requirement made no exception for "mass changes" in the law. In 1974, however, the Secretary granted state agencies the option of providing "general notice" of mass changes, either by a notice "mailed to all recipients," 39 Fed. Reg. 25996 (1974), or by pervasive publicity.[7] The form notice used in these cases presumably would have met this "general notice" requirement if general notice had been all that was required in 1981. In 1978, however, the Secretary subdivided the mass change regulation to address different types of changes. 43 Fed. Reg. 47915–47916 (1978). Subsection (e)(1) paralleled the 1974 mass change regulation, permitting notice of certain state and federal adjustments by pervasive publicity, "general notice mailed to households," or "individual notice." Subsection (e)(2) was new, however, and required "individual notices to households to inform them of the change."[8] Although the

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peals must always be permitted if mass change notices are vague. Otherwise, nothing in the Court's opinion would appear to prohibit state agencies from omitting such appeal rights in the future while still providing no more than the uninformative notice approved by the Court today.

[7] "When [a notice of adverse action] is not required . . . , the State agency shall publicize the possibility of a change in benefits through the various news media or through a general notice mailed out with ATP cards and with notices placed in food stamp and welfare offices." 7 CFR § 271.1(n)(3) (1975).

[8] The relevant provisions stated:

"(e) *Mass changes.* . . .

"(1) *Federal adjustments to eligibility standards, allotments, and deductions, State adjustments to utility standards.* . . .

"(ii) Although a notice of adverse action is not required, State agencies may send an individual notice to households of these changes. State agencies shall publicize these mass changes through the news media; posters in

difference between "general notices mailed to households" and "individual notices" was never defined by the Secretary, he directed that notice of the 1981 earned-income deduction change be given pursuant to subsection (e)(2), thereby requiring "individual" as opposed to "general" notice.

In the absence of some contrary indication, normal construction of language requires the conclusion that the Secretary employed different terms in the same regulation to mean different things. See *Crawford* v. *Burke*, 195 U. S. 176, 190 (1904); R. Dickerson, The Interpretation and Application of Statutes 224–225 (1975). And it is clear that the difference between the two types of notice must lie in their informational content, "general" versus "individual," because *both* types of notice must be mailed to individual households.[9] "General notices mailed to households" required no more than a form letter of identical content mailed to each of a large number of affected households; in contrast, "individual notice" going to many households must imply some more particularized, "individual" content.

Finally, the Court argues that the regulatory decision not to require a "notice of adverse action" for mass changes "surely implies" a decision to forgo "individual computations" as well. *Ante*, at 126. No such implication is logically required, however. The Court apparently fails to understand that "notice of adverse action" is a technical term of art used in the food stamp regulations to describe a special type of

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certification offices, issuance locations, or other sites frequented by certified households; or general notices mailed to households. . . . .

"(2) *Mass changes in public assistance.* . . .

" (ii) A notice of adverse action is not required when a household's food stamp benefits are reduced or terminated as a result of a mass change in the public assistance grant. However, State agencies shall send individual notices to households to inform them of the change. . . ." 7 CFR § 273.12(e) (1979).

[9] Thus the fact that "a separate individual notice was sent to each individual household," *ante*, at 126, proves nothing.

notice containing other information besides "the reason for the proposed action."[10] Thus when the Secretary proposed § 273.12(e)(2)(ii) in 1978, he distinguished "individual" mass change notice from a "notice of adverse action" by noting the information that a mass change notice need not contain:

> "Although households are not entitled to a notice of adverse action for mass changes[,] the regulations propose that States send households an individual notice which informs the household of the change but does not grant the household continuation rights if the household appeals the State agency action. In this way, households are advised of the change and can adjust household budgets accordingly." 43 Fed. Reg. 18896 (1978).[11]

Nothing was said to suggest that individual computations were not required in either type of notice. Indeed, by stating a purpose of providing affected households sufficient information so that they could adjust their budgets, the plain implication is to the contrary: each household was to be notified of mass changes in individual terms. It is difficult

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[10] In 1981, when the Department acted in this case, a "notice of adverse action" was required to contain

"in easily understandable language . . . [t]he proposed action; the reason for the proposed action; the household's right to request a fair hearing; the telephone number and, if possible, the name of the person to contact for additional information; the availability of continued benefits; and the liability of the household for any overissuances received while awaiting a fair hearing . . . . If there is an individual or organization available that provides free legal representation, the notice shall also advise the household of the availability of the service." 7 CFR § 273.13(a)(2) (1981).

[11] The Secretary erred in stating that households affected by mass changes had no right to continued benefits, since the regulations proposed on the same day clearly specified a right to continued benefits "if the issue being appealed is the computation of benefits." 43 Fed. Reg. 18931 (1978). But unlike a notice of adverse action, the proposed mass change notice was not required to inform recipients of that right.

to imagine how one could otherwise adjust one's household budget "accordingly."[12]

As far as I can tell, there has been no contemporaneous or consistent administrative interpretation of the regulation at issue; indeed, there has been no interpretation at all. Based on the language, function, and history of the regulation itself, however, any logical implication to be drawn is that the "individual notice" required by § 273.12(e)(2)(ii) comprehends some amount of individualized benefit data.[13] Conscious as well of the constitutional questions otherwise raised, I would affirm the judgment below on this ground alone.[14]

II

I can agree with the Court that the relevant statutory section, 7 U. S. C. § 2020(e)(10), may not of itself require "indi-

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[12] To the extent that the Court suggests that there is a difference between types of action ("adverse" as opposed to "mass") rather than in types of notice, *ante*, at 126, or that notice is required of "individual adverse action[s]" but not of mass changes, *ibid.*, it is apparent that the Court misapprehends the "familiar distinction between the individual adverse action and a mass change." *Ibid.* In terms of effect on the individual, there is no difference under either label. The "action"—a reduction in benefits—is exactly the same. Moreover, households affected in either case must receive "individual notice" and have some right to a fair hearing. The only difference is in the number of recipients affected and the amount of additional information their notices must contain.

[13] It should not go unnoted that just as the concept of "individual notice" silently appeared in the 1978 mass change regulations, the concept of "general" notice has now *disappeared* from the regulations without explanation. See 46 Fed. Reg. 44712, 44726 (1981) (proposing new § 273.12(12)(e)); 7 CFR § 273.12(e) (1985). It is ironic that although the concept of "general notice mailed to households" has thus passed from the regulatory scheme without a murmur, the majority today reincarnates it under the label of "individual notice," by approving the vague form notices that were used in these cases.

[14] The recipients' petition for certiorari in No. 83–6381, questioning the Court of Appeals' vacation of the District Court's injunctive relief, is not considered by the Court today. See *ante*, at 123. I need say only that on this record, I do not find that the Court of Appeals exceeded its remedial discretion.

vidual computations." The Court goes beyond this holding, however, to suggest that § 2020(e)(10) permits no notice at all of reductions based on legislated changes in benefit levels. *Ante*, at 126. Because all parties concede that some form of notice was required, the Court's broader statutory discussion is unnecessary to its decision. I find the Court's suggestion to be an erroneous reading that will cause needless confusion for food stamp administrators and recipients alike.

Although the Food Stamp Act of 1964, 78 Stat. 703, as amended, 7 U. S. C. §§ 2011–2029, is federally supervised, it is administered largely by separate agencies of the States.[15] Thus reductions in food stamp benefit levels, even if federally mandated, can be implemented only by state agencies. Section 2020(e)(10) requires that when a state agency acts, it must provide "for the granting of a fair hearing and a prompt determination thereafter to *any* household aggrieved by the action of the state agency under *any* provision of its plan of operation . . ." (emphasis added). It further mandates continuation of the prior level of food stamp benefits pending decision for "any household which timely requests such a fair hearing *after receiving individual notice of agency action reducing or terminating its benefits*" (emphasis added). As the Secretary acknowledges, the plain language of § 2020(e)(10) "*presupposes* the existence of notice." Reply Brief for Federal Respondent 11. The Court's conclusion that § 2020(e)(10) "does not itself mandate any notice at all," *ante*, at 125–126, is thus true only in the formalistic sense that words of command are not used. A congressional presupposition that notice will be sent, expressed in a statute directed to state agencies, can have no different legal effect than would a straightforward command.

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[15] Title 7 U. S. C. § 2020(d) directs that each "State agency . . . shall submit for approval" by the Secretary of Agriculture a "plan of operation specifying the manner in which [the food stamp] program will be conducted within the State in every political subdivision." State agencies are directly "responsible for the administration of the program within [each] State." 7 CFR § 271.4(a) (1985).

No distinction between types of "agency action"—mass or individual—appears in the language of § 2020(e)(10), and the statute's legislative history demonstrates that no distinction was intended. The controlling House Report explained that after *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), fair hearings would be required in all cases where a food stamp claimant will be "aggrieved" by *any* agency action, "whether it be a termination or reduction of benefits, a denial of an application for benefits, or other negative action. . . ." H. R. Rep. No. 95–464, p. 285 (1977). The Report went on to recite Congress' understanding that notice of all such "negative actions" was normally provided in all cases,[16] and indeed, such was the administrative practice in 1977. Although "notices of adverse action" were not always required, the 1977 regulations required *some* form of notice even for "mass changes." 7 CFR §§ 271.1(n)(2) and (3) (1977). Congress was thus well aware of, and legislated on the basis of, the contemporaneous administrative practice of providing notice of mass changes, and must be presumed to have intended to maintain that practice absent some clear indication to the contrary. *Haig* v. *Agee*, 453 U. S. 280, 297–298 (1981).[17]

Aside from language and legislative history, the logic of the statutory scheme is distorted by the Court's suggestion

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[16] "Each household must be notified in a timely manner usually ten days prior to the time the agency's decision will take effect." H. R. Rep. No. 95–464, p. 285 (1977); accord, S. Conf. Rep. No. 95–418, p. 197 (1977) (adopting House bill which requires "State agency notice of reduction or termination of [a household's] benefits").

[17] The Court rests its statutory argument on its view of the regulatory "background," which allegedly included a "distinction between the regulatory requirement regarding notice in the case of an adverse action and the *lack of such a requirement* in the case of a mass change." *Ante*, at 125 (emphasis supplied). No such distinction existed, however. The regulations in effect in 1977 plainly stated a requirement of notice of mass changes, 7 CFR § 271.1(n)(3) (1977), as the Court itself notes, *ante*, at 126, n. 28. Congress' approval of the 1977 administrative practice, therefore, cannot support the Court's suggestion that Congress thereby approved of no notice at all in the mass change context.

that notice is not required when mass reductions result from legislation. Notice is, of course, "an element of the fair hearing requirement" of § 2020(e)(10), *ante*, at 124, because it allows recipients whose benefits will be reduced or terminated to determine whether or not to request a fair hearing. Cf. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171–172 (1951) (Frankfurter, J., concurring) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice"). Congress expressed its view in 1977 that there would be little occasion to claim a fair hearing when legislative changes in benefit levels were implemented: "Hearings would, of course, be unnecessary *in the absence of claims of factual error in individual benefit computation and calculation.*" H. R. Rep. No. 95–464, at 289 (emphasis added).[18] Similarly, Congress directed that if in the course of a fair hearing "a determination is made that the sole issue being appealed is . . . *not a matter of fact or judgment relating to an individual case*," then benefits need not be continued under the proviso of § 2020(e)(10). *Id.*, at 286 (emphasis added). These very statements, however, demonstrate Congress' understanding that households affected by mass changes could request a fair hearing, and were *entitled* to a hearing if their claim was, among other things, miscalculation of benefits.[19] The Court does not discuss these legislative remarks. But congres-

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[18] We previously have affirmed the view that because the distinction between factual and policy-based appeals is often difficult to identify, the Due Process Clause constrains state agencies to err on the side of allowing hearings in doubtful or ambiguous cases. *Carleson* v. *Yee-Litt*, 412 U. S. 924 (1973) (summarily aff'g *Yee-Litt* v. *Richardson*, 353 F. Supp. 996 (ND Cal.)).

[19] The Court's statement that "it seems unlikely that Congress contemplated individual hearings for every household affected by a general change in the law," *ante*, at 124, is thus unobjectionable, but it has no apparent bearing on whether Congress contemplated *notice* of mass reductions so that fair hearings could be requested in appropriate cases before benefits are cut off.

sional discussion of guidelines for winnowing appeals simply makes no sense if no notice at all of mass reductions was intended.

Notice of reductions in benefit levels is thus the necessary predicate to implementation of the statutory fair hearing requirement. Indeed, the Court apparently accepts this view, stating that "whenever a household is entitled to a fair hearing, it is appropriate to read the statute as imposing a requirement of individual notice that would enable the household to request such a hearing." *Ante*, at 124. It is clear, however, that Congress intended and the regulations guarantee that mass reductions rightfully may be appealed if the claim is miscalculation. Yet the Court concludes there is no statutory "command to give notice of a general change in the law." *Ante*, at 126. This conclusion may generally be correct with regard to *enactment* of changes in the law, see *Texaco, Inc.* v. *Short*, 454 U. S. 516 (1982), but the plain terms of § 2020(e)(10) require notice of "agency action" taken to *implement* the law, if that action will result in "reduc[tion] or terminat[ion] of . . . benefits." Because legislated mass changes, like any other changes, can be implemented only by the action of state agencies, the notice requirement of § 2020(e)(10) is fully implicated in the mass change context.

The unambiguous purpose of the fair hearing and benefit continuation requirements of § 2020(e)(10) is to prevent erroneous reductions in benefits until a claim of error can be resolved. General changes in the law, no less than individual exercises of caseworker discretion, are likely to result in error when implemented, as the facts of these cases indicate and the Court acknowledges. *Ante*, at 127 ("[E]rrors . . . can occur in the administration of any large welfare program"). Timely and adequate notice permits the affected recipient to surmise whether an error has been made; if the recipient invokes the statutory right to a fair hearing, the agency then determines whether the recipient is correct. That reductions are implemented massively rather than on a case-by-case basis alters not at all this sensible administrative

scheme, operating as intended under § 2020(e)(10). By reading the statute not to require any notice at all when reductions or terminations of benefits are the result of agency implementation of a "general change in the law," the Court finds an exception not indicated by the statute, its legislative history, or relevant regulations, and not supported by any logical view of the food stamp administrative process. Federal administrators have required state agencies to give some form of notice of mass changes since before § 2020(e)(10)'s enactment until today. The Court's contrary suggestion, offered in cases where the discussion is unnecessary to the result, will disrupt an administrative scheme that appears to work smoothly without the Court's help.

III

Because food stamp benefits are a matter of statutory entitlement, recipients may claim a property interest only in the level of benefits to which they are entitled under the law, as calculated under whatever statutory formula is provided. Congress may reduce the entitlement level or alter the formula through the normal legislative process, and that process pretermits any claim that Congress' action constitutes unconstitutional deprivation of property. See *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 432–433 (1982).

Arguing from similar premises, the Court concludes that the food stamp recipients in these cases had no special right to "advance notice of the legislative change" in the earned-income deduction in 1981. *Ante*, at 130. The recipients, however, have never contended that they had a right to "advance notice" of the enactment of congressional legislation,[20] and I do not intend to argue for that proposition here. "It is

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[20] See, *e. g.*, Brief for Respondents Parker et al. 47, and n. 26 ("This is not a case in which the plaintiffs have challenged the authority of Congress to decrease the amount of [food stamp benefits]." "[T]he plaintiffs seek only to have the admittedly valid change in the program applied correctly to their individual cases"); see also Reply Brief for Respondents Parker et al. 9; Record, Amended Supplemental Complaint ¶ 1 (Jan. 6, 1982).

plain that sheer impracticality makes it implausible to expect the State *itself* to apprise its citizenry of the enactment of a statute of general applicability." *Texaco, Inc.* v. *Short, supra,* at 550 (BRENNAN, J., dissenting) (emphasis in original).

Instead, these cases involve the *implementation* of Congress' decision by its agents, the various state agencies that administer food stamp programs across the country. Owing to factors unique to the state agency and having nothing to do with Congress, implementation of the change in Massachusetts resulted in the *erroneous* reduction of food stamp benefits for a number of households. *Ante,* at 127; see *infra,* at 151, and n. 27. Because recipients have a constitutionally cognizable property interest in their proper statutory entitlement levels, it is deprivation of those interests by the state agency, and not the passage of legislation by Congress, that requires our constitutional attention in this case.[21]

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[21] Unlike the statute analyzed in *Texaco, Inc.* v. *Short,* 454 U. S. 516 (1982), the 1981 earned-income deduction change was not "self-executing," and as *Texaco* held, it is "essential" to distinguish "self-executing feature[s] of [a] statute" from actions taken subsequently to implement the legislative command. *Id.,* at 533. *Texaco* examined a challenge to a state law providing that mineral interests unused for 20 years *automatically* would revert to the surface owner unless a "statement of claim" was filed. *Id.,* at 518. Appellants claimed this law would effect an unconstitutional taking of their interests without due process unless they were notified when "their 20-year period of nonuse was about to expire." *Id.,* at 533. While upholding the statute, the Court repeatedly emphasized its "self-executing" character, and carefully noted that the Constitution would govern any action taken later to terminate finally appellants' property interests: "It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted, . . . the *full procedural protections of the Due Process Clause . . . including notice . . . must be provided.*" *Id.,* at 534 (emphasis supplied); see also *id.,* at 535 ("The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of" the law); *id.,* at 537 (distinguishing precedents on the ground that "the prop-

By focusing primarily on the "red herring" notice-of-legislative-change issue, the Court avoids explicit application of the multifactored interest-balancing test normally applied in our due process precedents. I understand the Court to make two basic arguments, however, in dismissing the recipients' constitutional claim to individualized notice of the Department's action. The first is to suggest that no notice at all is required when "inadvertent errors" are involved; such errors simply may be "put . . . to one side." *Ante*, at 127, 128. The second is that the form notice employed here sufficed to "adequately protect" the recipients' interests in any case, because recipients can be presumed to know the law regarding the earned-income deduction change and the notice told them how to appeal. *Ante*, at 130–131.

My consideration of these arguments is informed by two unchallenged facts. First, although not mentioned by the Court, when the Department sent its form notice and implemented the earned-income deduction change in December 1981, its officials knew that a substantial data entry backlog in its computerized record system meant that its food stamp files contained inaccurate earned-income information for a number of recipients. App. 85–89 (testimony of the Department's Systems Director); *id.*, at 214 (testimony of the Deputy Director of the Department's computerized file system); see also 722 F. 2d, at 938–939; Pet. App. 77–80. Thus the Department knew full well that when it took action to implement the legislative change, the food stamp benefits of a number of recipients were likely to be erroneously reduced or terminated. While the absence of such clear foreknowledge

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erty interest was taken only after a specific determination that the deprivation was proper"). *Texaco* thus plainly acknowledged that due process protections were required to prevent *erroneous applications* of the statute. As I also noted in *Texaco*, if "[t]he State may . . . feasibly provide notice when it asserts an interest directly adverse to particular persons, [it] may in that circumstance be constitutionally compelled to do so." *Id.*, at 550 (BRENNAN, J., dissenting).

might not make a constitutional difference, its presence here surely sharpens the constitutional analysis.

Second, the officials in charge of the Department's computer systems testified without contradiction that it was "not a problem" to generate a notice containing the individualized information ordered by the District Court, since that information was already contained in the computers, and that the necessary programming might have taken "a few hours." App. 224; see *id.*, at 80–84, 217–227. Thus the District Court's finding, unquestioned by the Court today, was that it was likely that individualized notices could have been provided in December 1981 "without causing any delay" or any "real hardship" to the Department. Pet. App. 74–75, 94.

A

In my view, the Court's offhand discussion of "inadvertent errors" is fogged by an unspoken conceptual confusion in identifying the constitutional deprivation claimed in these cases. In traditional cases arising under the Due Process Clause, a governmental deprivation of property is not difficult to identify: an individual possesses a set amount of property and the government's action either does, or does not, deprive the individual of some or all of it. Where "new" property interests—that is, statutory entitlements—are involved, however, claimants have an interest only in their benefit level as correctly determined under the law, rather than in any particular preordained amount. Thus, while *any* deprivation of tangible property by the State implicates the Due Process Clause, only an *erroneous* governmental reduction of benefits, one resulting in less than the statutorily specified amount, effects a deprivation subject to constitutional constraint. It is the error, and not the reduction *per se*, that is the deprivation.

Keeping this point in mind, it is readily apparent that this Court's application of the Due Process Clause to governmental administrative action has not only encompassed, but

indeed has been premised upon, the need for protection of individual property interests against "inadvertent" errors of the State. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970), *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), and *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S. 1 (1978), to name but a few examples, all involved administrative decisionmaking presumed to operate in good faith yet subject to normal and foreseeable, albeit unintentional, error.[22] Properly applied, regulations that govern administrative decisions

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[22] Although the Court does not define "inadvertent errors," its opinion and the facts of these cases indicate that the phrase describes errors made in good faith or unintentionally, rather than errors that could not possibly have been expected. Thus the Court acknowledges that such errors are well known to "occur in the administration of any large welfare program." *Ante*, at 127; see also *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S., at 18 ("[T]he risk of erroneous deprivation, given the necessary reliance on computers, is not insubstantial") (footnote omitted). Indeed, the testimony indicating that the Department knew that the stale data in its computer system would be used to determine new benefit levels suggests that the Court's characterization of the resulting errors as "inadvertent" is a charitable one.

In a footnote, the Court states that "[b]y hypothesis, an inadvertent error is one that the Department did not anticipate; for that reason, the Department could not give notice of a reduction that was simply the consequence of an unintended mistake." *Ante*, at 128, n. 30. In light of the Department's testimony and the Court's recognition that administrative errors are well known to occur in welfare programs, I can surmise only that the Court means that the Department did not anticipate which particular individuals would be erroneously affected, for the foreseeability of error against some portion of the class is clear and undisputed. See Brief for State Petitioner 60–61. The Court's further assertion that the Department "could not give notice of a reduction that was simply the consequence of an unintended mistake," is simply misguided. The reductions *per se* were the consequence of *Congress'* action, not the Department's, and they were certainly intended. The amount of the reductions was easily calculated, and notice could have been given. Only the Department's miscalculations were in any sense "unintended mistakes." While notice that a particular error would be made was, perhaps, impossible, notice of the reduction was both possible and required, for the very reason that only the recipients could identify particular errors before they took effect.

in such cases cannot deprive recipients of property, because a welfare or utility service recipient whose entitlement *should* be reduced or terminated under relevant statutes can claim no valid interest in continuation. Administrative decisions that affect statutory entitlements may often be correct. But when administrative error—that is, the deprivation—is foreseeable as a general matter and certain to occur in particular cases, constitutional procedures are interposed to ensure correctness insofar as feasible.[23]

"[A] primary function of legal process is to minimize the risk of erroneous decisions," *Mackey* v. *Montrym*, 443 U. S. 1, 13 (1979). Consequently, a foreseeable action that may cause deprivation of property must be "*preceded* by notice." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950) (emphasis added).[24] As we made clear in *Goldberg*, 397 U. S., at 267, in statutory entitlement cases the Due Process Clause normally requires "timely and adequate notice detailing the reasons" for proposed adverse administrative action. Such process is constitutionally required whenever the action may be "challenged . . . as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases." *Id.*, at 268.

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[23] One need not indisputably prove error before constitutional protections may be invoked; only a foreseeable probability of error need be shown. See, *e. g.*, *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972) (requiring a "legitimate *claim* of entitlement") (emphasis added); *Fuentes* v. *Shevin*, 407 U. S. 67, 86 (1972) ("Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of *undisputed* ownership") (emphasis added).

[24] See also *Roller* v. *Holly*, 176 U. S. 398, 409 (1900) ("That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of law to which no citation of authority would give additional weight"); *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified").

Thus, in my view, it is a novel and ill-considered suggestion to "put . . . to one side" unintended but foreseeable administrative errors that concededly had adverse effects on valid property interests. Such errors are at the *heart* of due process analysis. If the Constitution provides no protection against the visiting of such errors on statutory entitlement claimants, then the development of this Court's "new property" jurisprudence over the past 15 years represents a somewhat hollow victory. The fact that errors inevitably occur in the administration of any bureaucracy requires the conclusion that when the State administers a property entitlement program, it has a constitutional obligation to provide *some* type of notice to recipients before it implements adverse changes in the entitlement level, for the very reason that "inadvertent" erroneous reductions or terminations of benefits—that is, deprivations of property—are otherwise effected without any due process of law.[25]

[25] The Secretary argues that such errors "would likely be detected" after they occurred, "with corrective payments to all." Brief for Federal Respondent 25–26. Since the Department contends that the particular errors committed were unknown to it, however, it is not clear how they would be detected absent specific notice to the recipients. See *Vargas* v. *Trainor*, 508 F. 2d 485, 490 (CA7 1974), cert. denied, 420 U. S. 1008 (1975). Because the Department notably does not contend that every error that occurred in this case has in fact been detected, the Court of Appeals' order directing the Department "to check its files to ensure that [it] properly calculated the benefit reduction of each recipient," 722 F. 2d at 941, a remedy suggested by the Department itself, *ibid.*, was appropriate.

More importantly, however, the likelihood of postdeprivation correction is largely irrelevant to the constitutional inquiry regarding *notice*. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 340 (1976) (postdeprivation process relevant to whether predeprivation evidentiary hearing is required); but see *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 542 (1985) ("some form of pretermination hearing" is generally required). To paraphrase *Memphis Light, Gas & Water Division* v. *Craft*, 436 U. S., at 20, "[a]lthough [food stamp benefits] may be restored ultimately, the cessation of essential [benefits] for any appreciable time works uniquely final deprivation," and adequate notice therefore must precede the adverse action.

B

Because the errors in these cases cannot merely be ignored, I turn to the central constitutional inquiry: what process was due in light of "the practicalities and peculiarities of the case"? *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*, at 314. Experience demonstrates that balanced consideration of a number of factors is required: the importance of the private interest affected, the risk of erroneous deprivation under the system challenged, the protective value of the different procedures proposed, and the government's interests, including any "fiscal and administrative burdens" created by different procedures. *Logan* v. *Zimmerman Brush Co.*, 455 U. S., at 434; *Mathews* v. *Eldridge*, 424 U. S., at 334–335. These interests are relevant to determining the "content of the notice" as well as its timing and other procedural claims. *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975). Although the interests normally relevant to the constitutional due process inquiry are often characterized as "competing," *e. g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 542 (1985), the record makes clear that the Department failed to demonstrate any countervailing interest in not providing individualized notices in this case.

1. *Importance of the Interest.* The importance of the correct level of food stamp benefits to eligible households cannot be overstated. Designed "[t]o alleviate . . . hunger and malnutrition" and allow poverty level families "to purchase a nutritionally adequate diet," Pub. L. 91–671, § 2, 84 Stat. 2048, the food stamp program by definition provides benefits only to those persons who are unable to afford even a minimally adequate diet on their own. An erroneous reduction or break in benefits, therefore, may literally deprive a recipient "of the very means by which to live." *Goldberg*, *supra*, at 264.[26]

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[26] Census statistics indicate that the median annual income of all households receiving food stamps was less than $6,000 in 1982. Bureau of the

2. *Risk of Error.* Both courts below found that the likelihood of error by the Department in implementing the earned-income deduction change was substantial. 722 F. 2d, at 939; Pet. App. 88–95. The Court does not challenge that evaluation, and it is amply supported by the record. The existence of implementation errors was unchallenged at trial.[27] Because of a severe data entry backlog in the Department's computers during the fall of 1981, an undetermined number of food stamp recipients' files contained erroneous earned-income figures.[28] Thus, although the mathematical operation necessary to implement the statutory change was theoretically simple, its actual performance in Massachusetts necessarily carried with it a high risk of error.

The Department did not challenge the recipients' proof regarding the risk of error at trial, but instead argued as it

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Census, Characteristics of Households and Persons Receiving Selected Noncash Benefits: 1982, p. 19 (1984). "The 1984 poverty threshold is $8,280 for a family of three and $10,610 for a family of four." House Committee on Ways and Means, Children in Poverty, 99th Cong., 1st Sess., 196 (Comm. Print 1985). See also *Mathews* v. *Eldridge*, *supra*, at 340 ("[W]elfare assistance is given to persons on the very margin of subsistence").

[27] For example, a random sample of less than one-third of the 16,000 households that received the Department's December 1981 notice showed that 585 households listed as having *no* earned income nevertheless received the notice. Of these, 211 households experienced a change in their benefit level, although by statutory definition no change should have occurred. Pet. App. 81–82. Thus the Court's statement that Congress' "amendment had no effect on households with no income," *ante*, at 118, is simply wrong with regard to implementation of the law in Massachusetts.

[28] Data for over 9,000 of the households that received the notice at issue in these cases were contained in the affected computer system. Pet. App. 78. Over two-thirds of the data entries scheduled for this system had not been processed during the relevant period, and the District Court concluded that "it was more likely than not" that the correct earned-income information "for any of the [affected] households . . . was not entered . . . prior to implementation of the change in the earned income disregard." *Id.*, at 79.

does here that any such risk was caused not by the statutory change but by its ministerial implementation based on pre-existing data in the files. As indicated above, however, it is precisely that implementation, and not the statutory change, that the recipients have challenged throughout. The foreseeable risk of the Department's errors stands unrefuted.

3. *Value of Additional Procedures.* Adequate notice under the Due Process Clause has two components. It must inform affected parties of the action about to be taken against them as well as of procedures available for challenging that action. *Memphis Light*, 436 U. S., at 13; *Mullane*, 339 U. S., at 314. These requirements serve discrete purposes: adequate notice of the action itself permits the individual to evaluate its accuracy or propriety and to determine whether or not to contest it; notice of how to appeal ensures that available error-correction procedures will be effective. In *Memphis Light, supra*, the second component was examined, and I have no doubt that the Court today correctly concludes that recipients of the mass change notice here were adequately informed of the "procedure for protesting." 436 U. S., at 15; see *ante*, at 128.

These cases are the converse of *Memphis Light*, however, and the subtle yet vital failure of the notice here is that it completely failed to inform recipients of the particular action proposed to be taken against them *by the Department*.[29] The

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[29] The Court finds that the form notice here was adequate simply because it explained how to appeal and, if a recipient contacted the Department, their benefits were not reduced until a hearing was held. *Ante*, at 128. This rationale ignores the first component of notice that our cases recognize: notice of the proposed action. This notice told recipients only of Congress' change, and did not even identify the Department's action ("reduced *or* terminated," App. 5), let alone provide sufficient information to evaluate it. See n. 4, *supra*. By approving a form of notice that encourages recipients to appeal whether they have a reason or not, the Court likely adds to the costs of welfare administration. Moreover, as noted above, n. 6, no regulation required the Department to continue a recipi-

notice included only a single vague statement about some impending impact on food stamp benefits: due to *Congress'* action, recipient's benefits would "either be reduced . . . or . . . terminated." App. 5. The defendant in this lawsuit, however, is the Massachusetts Department of Public Welfare, not Congress, and the action of which notice was required was, it bears repeating, *not* Congress' decision to change the law but rather the Department's application of that changed law to individual recipients.[30] "Central to the evaluation of any administrative process is the nature of the relevant inquiry." *Mathews*, 424 U. S., at 343. In these cases the administrative inquiry was uncomplicated: what was the current earned income of each recipient, and what should his reduced food stamp benefit be after Congress' change was applied to that figure? The obvious value of notice of those simple factual determinations[31] is that they

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ent's benefits absent some claim of factual error. Unless the Court intends to impose such a requirement under the Constitution by its decision today, its ground for decision fails to support its constitutional conclusion.

[30] The Secretary was a party in the District Court only on the theory that the mass change regulation was unconstitutional. The District Court did not so hold, however, and its order ran solely against the state agency. The Department's authorities wrote and designed the particular form notice at issue, and only the errors caused by the Department's actions were the subject of challenge. In evaluating the adequacy of the notices, therefore, the value of additional information in preventing the Department's errors is the appropriate focus of analysis.

[31] It is conceded that implementation of the 1981 law required the Department to make these determinations in each individual case. See, *e. g.*, Brief for State Petitioner 65 (implementation "required a computer recalculation of each household's benefits"). I thus fail to understand the Court's suggestion that "[t]his, of course, would be a different case if the reductions were based on . . . individual factual determinations." *Ante*, at 131, n. 35. The Court might intend to distinguish actions requiring simple mathematical determinations from application of laws requiring greater judgment or discretion on the part of administrators. But we have never before suggested that such a distinction might make a difference, nor does

were the *only* data that would have enabled each recipient to "choose for himself whether to . . . acquiesce or contest," *Mullane, supra,* at 314, by filing a benefit-preserving appeal.[32]

The Court ultimately brushes aside any value that individualized notice may have had, stating that "citizens are presumptively charged with knowledge of the law," and asserting that "[s]urely Congress can presume that [a form] notice relative to a matter as important as a change in a food-stamp allotment would prompt an appropriate inquiry if not fully understood." *Ante,* at 130, 131. This reasoning is wholly unpersuasive. First, I am unwilling to agree that "[t]he entire structure of our democratic government," *ante,* at 131, rests on a presumption that food stamp recipients know and comprehend the arcane intricacies of an entitlement program that requires over 350 pages in the Code of Federal Regulations to explain and voluminous state manuals to administer. I am more certain that the premises of our polity include minimal protections for the property interests of the poor.

Moreover, in *Memphis Light,* the Court flatly rejected the argument that the poor can protect themselves without

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the Court provide any analytical justification for such a conclusion today. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), clearly stated that the procedural protections of the Due Process Clause apply whenever the potential for erroneous decision based on "incorrect or misleading factual premises or . . . misapplication of rules or policies to the facts of particular cases" exists. *Id.,* at 268. See also *Yee-Litt* v. *Richardson,* 353 F. Supp. 996 (ND Cal. 1973).

[32] The Secretary reports that households normally receive their first reduced benefit allotment "a few weeks after the notice." Brief for Federal Respondent 37. The form notice here, however, provided that recipients had a right to continued benefits pending a fair hearing only if their request were *received* within 10 days from the date of the notice. App. 5; see 7 CFR §§ 273.15(k)(1), 273.13(a)(1) (1981). Otherwise, a recipient had only a right to reimbursement for erroneously reduced benefits "as soon as administratively feasible" after prevailing in a fair hearing. 7 CFR § 273.15(r)(2) (1981).

process. The dissent there argued that "a homeowner surely need not be told how to complain about an error in a utility bill." 436 U. S., at 26 (STEVENS, J., dissenting). The Court ruled, however, that "skeletal notice" was constitutionally insufficient because utility customers are "of various levels of education, experience and resources," and "the uninterrupted continuity of [utility service] is essential to health and safety." *Id.*, at 14–15, n. 15. See also *Mathews* v. *Eldridge*, *supra*, at 349 ("[P]rocedures [must be] tailored . . . to 'the capacities and circumstances of those who are to be heard'") (citation omitted). In this case, over 45% of affected food stamp recipients in Massachusetts had not completed high school. App. 127. In such circumstances recipients must be "informed clearly." *Memphis Light*, 436 U. S., at 14–15, n. 15.

Additionally, this record reveals that the Court's reliance on the protective value of an "appropriate inquiry" is misplaced. The notice here did indeed state that recipients should call their local welfare office if they had "questions concerning the correctness of [their] benefits computation." App. 5. Putting aside the fact that the notice did not *inform* any recipient of his "benefits computation," the testimony of the representative named plaintiffs at trial was uniformly that the local welfare workers they called about the notice were either unaware of it or could not explain it. *Id.*, at 131 (Zades), 139 (Parker), 149 (Johnson). With no help forthcoming at the local level, the 10-day appeal period was virtually certain to expire before even those recipients who called would receive a specific explanation enabling them intelligently to decide whether or not to appeal.

Finally, the *Mathews* inquiry simply does not countenance rejection of procedural alternatives because a court finds existing procedures "adequate" in some ad hoc sense, without evaluation of whether additional procedures might have been more protective at little or no cost to the government. Yet the Court discusses neither the protective value of individ-

ualized notice in this context nor the burden, if any, that it would impose on the Department.

4. *Governmental Interests.* The District Court concluded that only four simple facts were necessary to transform this vague notice into one that adequately informed affected individuals about the Department's action in their particular cases: "whether [their benefits] were being reduced or terminated" and "the individual recipient's old food stamp benefit amount, new benefit amount, [and] the amount of earned income that was being used to compute the change." Pet. App. 100. These data were already contained in the Department's computerized files, and the computers could have been programmed to print the individualized information on the form notices with little additional time or effort.[33] The District Court's finding, not questioned by the Court today, was that programming the computer to provide such individual information is "neither a difficult nor burdensome procedure," *id.*, at 75–76, and that had the Department requested that such individualized data be printed on the December 1981 notices, it was likely that it could have been accomplished "without causing any delay . . . ." *Id.*, at 74, 75. This record, therefore, can support no argument that individualized notice would have been a burden for the Department.[34]

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[33] App. 80–84, 217–227. Indeed, prior to trial below the same computer system generated a list of recipients containing precisely the information found necessary by the District Court. Pet. App. 80. In light of this evidence, it is unsurprising that, as the District Court stated, "the Commonwealth [did] not argue the conservation of scarce fiscal resources." *Id.*, at 92–93. See also *Philadelphia Welfare Rights Organization* v. *O'Bannon*, 525 F. Supp. 1055, 1060 (ED Pa. 1981) (administrative burden in providing individualized notice of state implementation of the 1981 earned-income deduction change was "negligible").

[34] The District Court also found that individualized notice would "operat[e] to benefit the agency because such a notice should reduce the amount of client visits and phone calls to the agency seeking clarification, reduce

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The Court's regulatory conclusion is unconvincing, and its statutory dictum is unfortunate. But I am most troubled by the Court's casual suggestion that foreseeable "inadvertent" errors in the administration of entitlement programs may be ignored in determining what protection the Constitution provides. Such administrative error all too often plagues governmental programs designed to aid the poor.[35] If well-meaning mistakes that might be prevented inexpensively lie entirely outside the compass of the Due Process Clause, then the convenience of the administrative state comes at the expense of those least able to confront the bureaucracy. I respectfully dissent.

JUSTICE MARSHALL, dissenting.

I share JUSTICE BRENNAN's view that the logic of the relevant regulation, 7 CFR § 273.12(e)(2)(ii) (1985), requires the sort of notice that the lower courts ordered here. The regulation contemplates a notice that allows families to "adjust household budgets" according to changes in benefit levels,

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the amount of unnecessary appeals, and free up the time of the caseworkers for other tasks." Pet. App. 76–77; see App. 95–96 (expert testimony that vague mass change notice throws agency into "administrative chaos"). This finding is due deference in this Court. Although the Court properly rejects such evidence in its discussion of the regulations and statute, *ante*, at 127, n. 29, our constitutional precedents require that the "fiscal and administrative burdens" of process enter the analysis once it is determined that notice of some kind is required under the Due Process Clause. *Mathews*, 424 U. S., at 335; see *Mullane*, 339 U. S., at 317 (considering "practical difficulties and costs" of types of notice).

[35] See, *e. g.*, Hearing on Children, Youth, and Families in the Northeast before the House Select Committee on Children, Youth and Families, 98th Cong., 1st Sess., 51, 53 (1983); Hearings on HEW Efforts to Reduce Errors in Welfare Programs (AFDC and SSI) before the Subcommittee on Oversight of the House Committee on Ways and Means, 94th Cong., 2d Sess. (1976).

43 Fed. Reg. 18896 (1978), and I fail to see how a notice that does not inform recipients of their new benefit levels can serve this purpose. Given that this interpretation of the regulation disposes of the cases, I find no need to reach the other issues addressed by the Court or by the dissent. I therefore join Part I of JUSTICE BRENNAN's dissent.

Syllabus

NORTHEAST BANCORP, INC., ET AL. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 84–363. Argued April 15, 1985—Decided June 10, 1985

The Bank Holding Company Act of 1956 (BHCA) requires a bank holding company to obtain the approval of the Federal Reserve Board (Board) before it may acquire a bank. Section 3(d) of the Act (known as the Douglas Amendment) prohibits the Board from approving an application of a bank holding company located in one State to acquire a bank located in another State unless the acquisition "is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." Substantially similar Connecticut and Massachusetts statutes provide that an out-of-state bank holding company with its principal place of business in one of the other New England States may acquire an in-state bank, provided that the other State accords equivalent reciprocal privileges to the enacting State's banking organizations. Certain bank holding companies (respondents here) applied to the Board as out-of-state companies for purposes of either the Connecticut or Massachusetts statute, seeking approval for acquisitions of banks located in one or the other of those States. Petitioners, prospective competitors, opposed the proposed acquisitions in proceedings before the Board, contending that the acquisitions were not authorized by the Douglas Amendment and that, if they were, the applicable Connecticut or Massachusetts statute, by discriminating against non-New England out-of-state bank holding companies, violated the Commerce, Compact, and Equal Protection Clauses of the Federal Constitution. Rejecting petitioners' contentions, the Board approved the applications, and the Court of Appeals, in consolidated review proceedings, affirmed.

Held:

1. The Connecticut and Massachusetts statutes are of the kind contemplated by the Douglas Amendment to lift its ban on interstate acquisitions. The Amendment's language plainly permits States to lift the federal ban entirely, and although it does not specifically indicate that a State may partially lift the ban, neither does it specifically indicate that a State is allowed only the alternatives of leaving the federal ban in place or lifting it completely. The Amendment's legislative history indicates

that Congress intended to allow each State flexibility in its approach, contemplating that some States might partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation. Moreover, the Connecticut and Massachusetts statutes, by allowing only regional acquisitions, are consistent with the Amendment's and the BHCA's purpose of retaining local, community-based control over banking. Pp. 168–173.

2. The Connecticut and Massachusetts statutes do not violate the Commerce Clause. Congress' commerce power is not dormant here, but has been exercised by enactment of the BHCA and the Douglas Amendment, authorizing the challenged state statutes. State actions that Congress plainly authorizes are invulnerable to constitutional attack under the Commerce Clause. Pp. 174–175.

3. The challenged state statutes do not violate the Compact Clause, which provides that no State, without Congress' consent, shall enter into an agreement or compact with another State. Even assuming, *arguendo*, that the state statutes (along with statutes of other New England States under petitioners' theory) constitute an agreement or compact, "application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *New Hampshire* v. *Maine*, 426 U. S. 363, 369, quoting *Virginia* v. *Tennessee*, 148 U. S. 503, 519. In view of the Douglas Amendment, the challenged state statutes, which comply with the BHCA, cannot possibly infringe federal supremacy. Nor do the state statutes in question either enhance the *political* power of the New England States at the expense of other States or have an impact on the federal structure. Pp. 175–176.

4. The Connecticut and Massachusetts statutes do not violate the Equal Protection Clause. The statutes favor out-of-state corporations within the New England region over corporations from other parts of the country. However, Connecticut and Massachusetts, in enacting their statutes, considered that interstate banking on a regional basis combined the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need credit and those who provide credit, and that acquisition of in-state banks by holding companies headquartered outside the New England region would threaten the independence of local banking institutions. These concerns meet the traditional rational basis for judging equal protection claims. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U. S. 869, distinguished. Pp. 176–178.

740 F. 2d 203, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which all other Members joined except POWELL, J., who took no part in the decision of the case. O'CONNOR, J., filed a concurring opinion, *post*, p. 178.

Stephen M. Shapiro argued the cause for petitioners. With him on the brief for petitioner Citicorp were *Ira M. Millstein*, *Robert L. Stern*, *James W. Quinn*, and *Jay N. Fastow*. *George D. Reycraft*, *John Boyer*, *Jeffrey Q. Smith*, *Gregory Scott Mertz*, and *Joseph Polizzotto* filed a brief for petitioners Northeast Bancorp, Inc., et al. The named attorneys filed a joint reply brief and supplemental memorandum for all petitioners.

Solicitor General Lee argued the cause for the federal respondent. With him on the brief were *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Wallace*, *Anthony J. Steinmeyer*, and *Michael Kimmel*. *Laurence H. Tribe* argued the cause for respondents Bank of New England Corp. et al. With him on the briefs were *Bertram M. Kantor*, *Michael H. Byowitz*, *Mark A. Weiss*, *Stuart C. Stock*, *Wilmot T. Pope*, and *Douglas M. Kraus*. *Francis X. Bellotti*, Attorney General, *Jamie W. Katz*, Assistant Attorney General, and *Thomas R. Kiley*, First Assistant Attorney General, filed a brief for respondent Commonwealth of Massachusetts. *Joseph I. Lieberman*, Attorney General, *Elliot F. Gerson*, Deputy Attorney General, and *John G. Haines* and *Jane D. Comerford*, Assistant Attorneys General, filed a brief for respondents State of Connecticut et al.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York by *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor General, *R. Scott Greathead*, First Assistant Attorney General, and *Judith T. Kramer* and *Howard L. Zwickel*, Assistant Attorneys General; for Chase Manhattan Corp. by *Joseph A. Califano, Jr.*, and *Kent T. Stauffer*; for the David F. Bolger Revocable Trust by *William A. Harvey* and *Edward S. Ellers*; for the New York State Bankers Association by *John*

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents Bank of New England Corporation (BNE), Hartford National Corporation (HNC), and Bank of Boston Corporation (BBC) are bank holding companies which applied to the Federal Reserve Board to obtain approval for the acquisition of banks or bank holding companies in New England States other than the ones in which they are principally located. Petitioners Northeast Bancorp, Inc., Union Trust Company, and Citicorp opposed these proposed acquisitions in proceedings before the Board. The Board approved the acquisitions, and the Court of Appeals for the Second Circuit affirmed the orders of the Board. Petitioners sought certiorari, contending that the acquisitions were not authorized by the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U. S. C. § 1841 *et seq.*, and that, if they were authorized by that Act, the state statutes which permitted the acquisitions in each case violated the Commerce Clause and the Compact Clause of the United States Constitution. We granted certiorari because of the importance of these issues, 469 U. S. 810, and we now affirm.

The Bank Holding Company Act (BHCA) regulates the acquisition of state and national banks by bank holding com-

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Leferovich, Jr.; for Senator Alphonse D'Amato et al. by *J. Robert Lunney;* and for Frank L. Morsani by *Dewey R. Villareal, Jr.*

Briefs of *amici curiae* urging affirmance were filed for the State of Georgia by *Michael J. Bowers*, Attorney General, *James P. Googe, Jr.*, Executive Assistant Attorney General, *H. Perry Michael*, First Assistant Attorney General, *Verley J. Spivey*, Senior Assistant Attorney General, and *Grace E. Evans*, Assistant Attorney General; for Bank of New York Co., Inc., by *John L. Warden;* for the Conference of State Bank Supervisors by *Erwin N. Griswold, James F. Bell*, and *Arthur E. Wilmarth, Jr.;* for the Council of State Governments et al. by *Joyce Holmes Benjamin* and *Vicki C. Jackson;* for Fleet Financial Group, Inc., by *Allan B. Taylor, J. Bruce Boisture, Robert M. Taylor III*, and *Edward W. Dence, Jr.;* and for Bob Graham, Governor of Florida, et al. by *J. Thomas Cardwell, Sydney H. McKenzie III, S. Craig Kiser*, and *Carl B. Morstadt.*

Robert F. Mullen filed a brief for the New York Clearing House Association as *amicus curiae.*

panies. The Act generally defines a bank as any institution organized under state or federal law which "(1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans." 12 U. S. C. § 1841(c). The Act defines a bank holding company as any corporation, partnership, business trust, association, or similar organization that owns or has control over a bank or another bank holding company. §§ 1841(a)(1), (b); see § 1841(a)(5). Before a company may become a bank holding company, or a bank holding company may acquire a bank or substantially all of the assets of a bank, the Act requires it to obtain the approval of the Federal Reserve Board. § 1842.

The Board will evaluate the proposed transaction for anticompetitive effects, financial and managerial resources, community needs, and the like. § 1842(c). In addition, § 3(d) of the Act, 12 U. S. C. § 1842(d), known as "the Douglas Amendment," prohibits the Board from approving an application of a bank holding company or bank located in one State to acquire a bank located in another State, or substantially all of its assets, unless the acquisition "is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." Pursuant to the Douglas Amendment, a number of States recently have enacted statutes which selectively authorize interstate bank acquisitions on a regional basis. This case requires us to consider the validity of these statutes.

From 1956 to 1972, the Douglas Amendment had the effect of completely barring interstate bank acquisitions because no State had enacted the requisite authorizing statute. Beginning in 1972, several States passed statutes permitting such acquisitions in limited circumstances or for specialized purposes. For example, Iowa passed a grandfathering statute which had the effect of permitting the only out-of-state bank holding company owning an Iowa bank to maintain and expand its in-state banking activities, Iowa Code § 524.1805 (1983); see *Iowa Independent Bankers* v. *Board of Gover-*

nors, 167 U. S. App. D. C. 286, 511 F. 2d 1288, cert. denied, 423 U. S. 875 (1975); Washington authorized out-of-state purchasers to acquire failing local banks, Wash. Rev. Code § 30.04.230(4)(a) (Supp. 1985); and Delaware allowed out-of-state bank holding companies to set up special purpose banks, such as credit card operations, in Delaware so long as they do not compete in other respects with locally controlled full-service banks, Del. Code Ann., Tit. 5, § 801 *et seq.* (Supp. 1984).

Beginning with Massachusetts in December 1982, several States have enacted statutes lifting the Douglas Amendment ban on interstate acquisitions on a reciprocal basis within their geographic regions. The Massachusetts Act specifically provides that an out-of-state bank holding company with its principal place of business in one of the other New England States (Connecticut, Maine, New Hampshire, Rhode Island, and Vermont), which is not directly or indirectly controlled by another corporation with its principal place of business located outside of New England, may establish or acquire a Massachusetts-based bank or bank holding company, provided that the other New England State accords equivalent reciprocal privileges to Massachusetts banking organizations. Mass. Gen. Laws Ann., ch. 167A, § 2 (West 1984). In June 1983, Connecticut followed suit by adopting a substantially similar statute. 1983 Conn. Pub. Acts 83–411.

The other New England States have taken different courses or have not acted. Rhode Island, in May 1983, authorized acquisition of local banks by out-of-state bank holding companies on a reciprocal basis similarly limited to the New England region, but this geographic limitation will expire on June 30, 1986, after which the authorization will extend nationwide subject only to the reciprocity requirement. R. I. Gen. Laws § 19–30–1 *et seq.* (Supp. 1984). Since February 1984, Maine has permitted banking organizations from all other States to acquire local banks without any

reciprocity requirement. Me. Rev. Stat. Ann., Tit. 9–B, § 1013 (Supp. 1984–1985). At the other extreme, New Hampshire and Vermont have not enacted any statute releasing the Douglas Amendment's ban on interstate bank acquisitions.

One predictable effect of the regionally restrictive statutes will apparently be to allow the growth of regional multistate bank holding companies which can compete with the established banking giants in New York, California, Illinois, and Texas. See 740 F. 2d 203, 209, and n. 16 (1984). The Massachusetts and Connecticut statutes have prompted at least 15 other States to consider legislation which, according to the Federal Reserve Board, would establish interstate banking regions in all parts of the country. 70 Fed. Res. Bull. 374, 375–376 (1984). At least seven of these States have already enacted the necessary statutes.

Two months after Connecticut passed its statute, BNE applied to the Board for approval of its merger with respondent CBT Corporation (CBT), a Connecticut bank holding company, and thereby to acquire indirectly the Connecticut Bank and Trust Company, N. A., of Hartford, Connecticut. Soon thereafter HNC applied to the Board for approval of the acquisition of Arltru Bank Corporation (Arltru), a Massachusetts bank holding company which owns the Arlington Trust Company, a bank located in Lawrence, Massachusetts. Finally BBC applied to the Board for approval of the acquisition of the successor by merger to Colonial Bancorp, Inc., a Connecticut bank holding company, by which it would acquire Colonial Bank of Waterbury, Connecticut.

Citicorp offers financial services to consumers and businesses nationally through its bank and nonbank subsidiaries. In response to the Board's invitation for comments from interested persons on these three proposed acquisitions, Citicorp submitted comments opposing all three of them. Northeast owns petitioner Union Trust Company, a Connecticut bank that competes directly with banks owned by CBT,

HNC, and Colonial. In addition, Bank of New York Corporation has agreed to acquire Northeast if Connecticut or the United States enacts the necessary enabling legislation. Northeast and Union Trust submitted comments opposing BNE's application to acquire CBT.

The petitioners challenged the applications in part on the ground that the Douglas Amendment did not authorize them, and in part on the grounds that the Massachusetts and Connecticut statutes, by discriminating against non-New England bank holding companies, violated the Commerce, Compact, and Equal Protection Clauses of the Federal Constitution. They claimed, therefore, that the proposed interstate acquisitions were not authorized by valid state statutes as required by the Douglas Amendment. The Board rejected these arguments. It first determined that the BNE-CBT and BBC-Colonial acquisitions were specifically authorized by the Connecticut statute and the HNC-Arltru acquisition was specifically authorized by the Massachusetts statute, and therefore that the Douglas Amendment would not prevent the Board from approving any of the three proposed transactions.

The Board then rejected the constitutional challenge to the two state statutes. In doing so, it noted that it would hold a state statute unconstitutional only if there was "clear and unequivocal evidence" of its unconstitutionality. 70 Fed. Res. Bull. 353, 354 (1984); *id.*, at 376; 70 Fed. Res. Bull. 524, 525–526 (1984). While stating that "the issue is not free from doubt," it concluded that this standard had not been met. 70 Fed. Res. Bull, at 376–377. Interpreting the statutory language and the legislative history of the Douglas Amendment, it determined that "the Douglas Amendment should be read as a renunciation of federal interest in regulating the interstate acquisition of banks by bank holding companies." *Id.*, at 380. This renunciation of federal interest eliminated any objection to the statutes under the Compact Clause or dormant Commerce Clause.

The Board also found nothing in the history of the Amendment to suggest that "the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry." *Id.*, at 386. The Board disposed of the equal protection challenge by reasoning that the regional restriction in the two statutes was "rationally related to an attempt to maintain a banking system responsive to local needs in New England." *Id.*, at 381. The Board then analyzed the proposed transactions in light of the relevant statutory considerations set out in 12 U. S. C. §§ 1842(c) and 1843(c)(8) and approved the applications.

Pursuant to 12 U. S. C. § 1848, which provides that "[a]ny party aggrieved by an order of the Board" may seek review in a federal court of appeals, and § 1850, which permits prospective competitors to be aggrieved parties under § 1848, Citibank, Northeast, and Union Trust petitioned the Court of Appeals for the Second Circuit to review the Board's order approving the BNE-CBT acquisition. Citibank also petitioned for review of the HNC-Arltru acquisition, and Northeast and Union Trust were permitted to intervene. These petitions were consolidated and the acquisitions stayed pending expedited review. Meanwhile, the Board stayed its order approving the BBC-Colonial acquisition, and the Court of Appeals consolidated a petition filed by Citicorp for review of that transaction with the two other pending review petitions. The court also permitted BBC, BNE, CBT, HNC, the State of Connecticut, and the Commonwealth of Massachusetts to intervene. The Court of Appeals affirmed the Board's orders approving the three applications in all respects. 740 F. 2d 203 (1984). It agreed with the Board's determination that the Connecticut and Massachusetts statutes satisfied the terms of the Douglas Amendment, and it then rejected challenges to the Board's orders under the Commerce Clause, the Compact Clause, and the Equal Protection Clause. The Court of Appeals stayed its mandate

and ordered that the status quo be maintained pending disposition by this Court.

The Douglas Amendment

The Douglas Amendment to the BHCA prohibits the Board from approving the application of a bank holding company or a bank located in one State to acquire a bank located in another State, or substantially all of its assets, unless the acquisition "is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." § 1842(d). Clearly the proposed acquisitions with which we deal in this case must be consistent with the Douglas Amendment, or they are invalid as a matter of federal statutory law. If the Massachusetts and Connecticut statutes allowing regional acquisitions are not the type of state statutes contemplated by the Douglas Amendment, they would not lift the ban imposed by the general prohibition of the Douglas Amendment. While petitioners blend together arguments about the meaning of the Douglas Amendment with arguments about the effect of the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, we think the contentions are best treated separately.

The Board resolved the statutory issue in favor of the state statutes, concluding that they were the sort of laws contemplated by the Douglas Amendment. While the Board apparently does not consider itself expert on any constitutional issues raised, it is nonetheless an authoritative voice on the meaning of a federal banking statute. *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, 468 U. S. 207 (1984). The Board may have applied a higher standard than was necessary when it analyzed the Douglas Amendment to see whether there was a "clear authorization" for selective lifting of the ban, such as the Massachusetts and Connecticut statutes undertake to do. Whether or not so stringent a standard was applicable, we think the Board was correct in concluding that it was in fact met in this case.

The language of the Douglas Amendment plainly permits States to lift the federal ban entirely, as has been done by Maine. It does not specifically indicate that a State may partially lift the ban, for example in limited circumstances, for special types of acquisitions, or for purchasers from a certain geographic region. On the other hand, it also does not specifically indicate that a State is allowed only two alternatives: leave the federal ban in place or lift it completely. The Board concluded that the language "does not appear *on its face* to authorize discrimination" by region or "to meet the stringent test of explicitness laid down by" this Court in the dormant Commerce Clause cases. 70 Fed. Res. Bull., at 384. We need not resolve this issue because we agree with the Board that the legislative history of the Amendment supplies a sufficient indication of Congress' intent.

At the time of the BHCA, interstate branch banking was already prohibited by the McFadden Act. 12 U. S. C. § 36(c). The bank holding company device, however, had been created to get around this restriction. A holding company would purchase banks in different localities both within and without a State, and thereby provide the equivalent of branch banking. One of the major purposes of the BHCA was to eliminate this loophole. H. R. Rep. No. 609, 84th Cong., 1st Sess., 2–6 (1955); 101 Cong. Rec. 4407 (1955) (remarks of Rep. Wier); *id.*, at 8028–8029 (remarks of Rep. Patman); 102 Cong. Rec. 6858–6859 (1956) (remarks of Sen. Douglas). As enacted by the House in 1955, the BHCA contained a flat ban on interstate bank acquisitions. The legislative history from the House makes it clear that the policies of community control and local responsiveness of banks inspired this flat ban. See 101 Cong. Rec. A2454 (1955) (remarks of Rep. Wier); *id.*, at 8030–8031 (remarks of Rep. Rains); H. R. Rep. No. 609, *supra*, at 2–6.

The Douglas Amendment was added on the floor of the Senate. Its entire legislative history is confined to the Senate debate. In such circumstances, the comments of individ-

ual legislators carry substantial weight, especially when they reflect a consensus as to the meaning and objectives of the proposed legislation though not necessarily the wisdom of that legislation. The instant case is not a situation where the comments of an individual legislator, even a sponsor, is at odds with the language of the statute or other traditionally more authoritative indicators of legislative intent such as the conference or committee reports.

The bill reported out by the Senate Committee on Banking and Currency permitted interstate bank acquisitions conditioned only on approval by the Federal Reserve Board. This approach apparently was favored by many of the large bank holding companies which sought further expansion, see, *e. g.*, Control of Bank Holding Companies, 1955: Hearings on S. 880 et al. before the Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 1st Sess., 132, 136 (1955) (testimony of Ellwood Jenkins, First Bank Stock Corp.), 298–299 (Baldwin Maull, Marine Midland Corp.), 320 (Cameron Thomson, Northwest Bancorporation), cf. 375, 385 (Frank N. Belgrano, Jr., Transamerica Corp.), and by some who thought the total ban in the House bill offensive to States' rights, see 102 Cong. Rec. 6752 (1956) (remarks of Sen. Robertson, floor manager of Committee bill, quoting Sen. Maybank).

The Douglas Amendment was a compromise between the two extremes that also accommodated the States' rights concern:

> "Our amendment would prohibit bank holding companies from purchasing banks in other States unless such purchases by out-of-State holding companies were specifically permitted by law in such States." *Id.*, at 6860 (remarks of Sen. Douglas).

Accord, *ibid.* (remarks of Sen. Bennett in opposition to the Amendment).

Of central concern to this litigation, the Douglas compromise did not simply leave to each State a choice one way or

the other—either to permit or bar interstate acquisitions of local banks—but to allow each State flexibility in its approach. Senator Douglas explained that under his amendment bank holding companies would be permitted to acquire banks in other States "only to the degree that State laws expressly permit them." *Id.*, at 6858. Petitioners contend that by the phrase "to the degree" Senator Douglas intended merely a quantitative reference to the number of States which might lift the ban, and did not mean that a State could partially lift the ban. Petitioners' contention, however, is refuted by the close analogy drawn by Senator Douglas between his amendment and the McFadden Act, 12 U. S. C. § 36(c):

> "The organization of branch banks proceeded very rapidly in the 1920's, and to check their growth various States passed laws limiting, and in some cases preventing it, as in the case of Illinois. National banks had previously been implicitly prohibited from opening branches, and there was a strong movement to remove this prohibition and completely open up the field for the national banks. This, however, was not done. Instead, by the McFadden Act and other measures, national banks have been permitted to open branches only to the degree permitted by State laws and State authorities.
>
> "I may say that what our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them; and that is the provision of the McFadden Act." *Ibid.*

See *id.*, at 6860.

In enacting the McFadden Act in 1927, Congress relaxed federal restrictions on branch banking by national banks, but at the same time subjected them to the same branching

restrictions imposed by the States on state banks. *First National Bank* v. *Walker Bank & Trust Co.*, 385 U. S. 252, 258 (1966). Congress intended "to leave the question of the desirability of branch banking up to the States," *ibid.*, and to permit branch banking by national banks "'in only those States the laws of which permit branch banking, and only to the extent that the State laws permit branch banking.'" *Id.*, at 259 (quoting Sen. Glass, 76 Cong. Rec. 2511 (1933)). The McFadden Act did not offer the States an all-or-nothing choice with respect to branch banking. As Senator Douglas observed, some States had *limited* intrastate branching by state banks, and others like Illinois had *prohibited* it altogether.

This variative approach to intrastate branching was nicely illustrated at the time by the structure in New York, which Senator Douglas described as follows: "In New York the State is divided into 10 zones. Branch banking is permitted within each of the zones, but a bank cannot have branches in another zone." 102 Cong. Rec. 6858 (1956). At the same time, Pennsylvania permitted branching in contiguous counties. *Upper Darby National Bank* v. *Myers*, 386 Pa. 12, 124 A. 2d 116 (1956). In view of this analogy to the McFadden Act and Senator Douglas' explanation of that Act, there can be no other conclusion but that Congress contemplated that some States might partially lift the ban on interstate banking without opening themselves up to interstate banking from everywhere in the Nation.

Not only are the Massachusetts and Connecticut statutes consistent with the Douglas Amendment's anticipation of differing approaches to interstate banking, but they are also consistent with the broader purposes underlying the BHCA as a whole and the Douglas Amendment in particular to retain local, community-based control over banking. Faced with growing competition from nonbank financial services that are not confined within state lines, these States sought an alternative that allowed expansion and growth of local

banks without opening their borders to unimpeded interstate banking. The Connecticut General Assembly established a Commission in 1979 to study the problem. It concluded:

> "Both at the national and state levels the philosophy underlying our structure of bank regulation has been to promote a pluralistic banking system—a system comprised of many units, rather than a highly concentrated system made up of a few large banks. The promotion of local ownership and control of banks has as one of its objectives the preservation of a close relationship between those in our communities who need credit and those who provide credit. To allow the control of credit that is essential for the health of our state economy to pass to hands that are not immediately responsive to the interests of Connecticut citizens and businesses would not, we believe, serve our state well. Similarly, to expose our smaller banks to the rigors of unlimited competition from large out-of-state banking organizations—particularly at a time when deregulation of banking products at the federal level is already putting strains on the resources of smaller banks—would not be wise." Report to the General Assembly of the State of Connecticut (Jan. 5, 1983), 4 App. in No. 84–4047 (CA2), pp. 1230, 1240–1241.

Rather, the Commission proposed "an experiment in regional banking" as a first step toward full interstate banking which "would afford the legislature an opportunity to make its own calculus of the benefits and detriments that might result from a broader program of interstate banking." *Id.*, at 1241–1242. The Connecticut General Assembly adopted the Commission's recommendations, and we believe that Connecticut's approach is precisely what was contemplated by Congress when it adopted the Douglas Amendment.

We hold that the Connecticut and Massachusetts statutes are of the kind contemplated by the Douglas Amendment to lift its bar against interstate acquisitions.

Commerce Clause

Petitioners contend that the regional limitation in the Massachusetts and Connecticut statutes burdens commerce from without the region while permitting a free flow of commerce among the States within the region. They provide numerous citations to prove that one of the principal purposes of the Framers of the Constitution was to break up and forestall precisely this type of economic "Balkanization" into confederations of States to the detriment of the welfare of the Union as a whole. See, *e. g.*, *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 533 (1949); *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979); The Federalist Nos. 7 and 22, pp. 62–63, 143–145 (Rossiter ed. 1961). There can be little dispute that the dormant Commerce Clause would prohibit a group of States from establishing a system of regional banking by excluding bank holding companies from outside the region if Congress had remained completely silent on the subject. *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 39–44 (1980). Nor can there be serious question that an individual State acting entirely on its own authority would run afoul of the dormant Commerce Clause if it sought to comprehensively regulate acquisitions of local banks by out-of-state holding companies. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U. S. 941 (1982).

But that is not our case. Here the commerce power of Congress is not dormant, but has been exercised by that body when it enacted the Bank Holding Company Act and the Douglas amendment to the Act. Congress has authorized by the latter amendment the Massachusetts and Connecticut statutes which petitioners challenge as violative of the Commerce Clause. When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause. *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U. S. 648, 653–654 (1981); *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983); cf. *South-Central Timber Development, Inc.* v. *Wunnicke*,

467 U. S. 82 (1984). Petitioners' Commerce Clause attack on the challenged acquisitions therefore fails.

Compact Clause

Petitioners maintain that the Massachusetts and Connecticut statutes constitute a compact to exclude non-New England banking organizations which violates the Compact Clause, U. S. Const., Art. I, § 10, cl. 3, because Congress has not specifically approved it. We have some doubt as to whether there is an agreement amounting to a compact. The two statutes are similar in that they both require reciprocity and impose a regional limitation, both legislatures favor the establishment of regional banking in New England, and there is evidence of cooperation among legislators, officials, bankers, and others in the two States in studying the idea and lobbying for the statutes. But several of the classic indicia of a compact are missing. No joint organization or body has been established to regulate regional banking or for any other purpose. Neither statute is conditioned on action by the other State, and each State is free to modify or repeal its law unilaterally. Most importantly, neither statute requires a reciprocation of the regional limitation. Bank holding companies based in Maine, which has no regional limitation, and Rhode Island, which will drop the regional limitation in 1986, are permitted by the two statutes to acquire Massachusetts and Connecticut banks. These two States are included in the ostensible compact under petitioners' theory, yet one does not impose the exclusion to which petitioners so strenuously object and the other plans to drop it after two years.

But even if we were to assume that these state actions constitute an agreement or compact, not every such agreement violates the Compact Clause. *Virginia* v. *Tennessee*, 148 U. S. 503 (1893).

> "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in

> the States, which may encroach upon or interfere with the just supremacy of the United States.'" *New Hampshire* v. *Maine*, 426 U. S. 363, 369 (1976), quoting *Virginia* v. *Tennessee*, *supra*, at 519.

See *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U. S. 452, 471 (1978).

In view of the Douglas Amendment to the BHCA, the challenged state statutes which comply with that Act cannot possibly infringe federal supremacy. To the extent that the state statutes might conflict in a particular situation with other federal statutes, such as the provision under which the Federal Deposit Insurance Corporation will arrange for the acquisition of failing banks by out-of-state bank holding companies, 12 U. S. C. § 1823(f), they would be pre-empted by those statutes, and therefore any Compact Clause argument would be academic. Petitioners also assert that the alleged regional compact impermissibly offends the sovereignty of sister States outside of New England. We do not see how the statutes in question either enhance the *political* power of the New England States at the expense of other States or have an "impact on our federal structure." *United States Steel Corp.* v. *Multistate Tax Comm'n*, *supra*, at 471, 473.

Equal Protection Clause

Petitioners argued before the Board and the Court of Appeals that the Massachusetts and Connecticut statutes violated the Equal Protection Clause, U. S. Const., Amdt. 14, § 2, by excluding bank holding companies from some States while admitting those from others. This claim was abandoned in their petition for certiorari and their briefs on the merits, but after our decision in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U. S. 869 (1985), petitioners filed a supplemental brief urging us to consider the equal protection issue. Because the issue was fully reviewed by the Board and the Court of Appeals and because it would undoubtedly

cloud other pending applications for acquisitions by bank holding companies, we elect to decide it.

In *Metropolitan Life* we held that encouraging the formation of new domestic insurance companies within a State and encouraging capital investment in the State's assets and governmental securities were not, standing alone, legitimate state purposes which could permissibly be furthered by discriminating against out-of-state corporations in favor of local corporations. There we said:

> "This case does not involve or question, as the dissent suggests, *post*, at 900–901, the broad authority of a State to promote and regulate its own economy. We hold only that such regulation may not be accomplished by imposing discriminatorily higher taxes on nonresident corporations solely because they are nonresidents." *Id.*, at 882, n. 10.

Here the States in question—Massachusetts and Connecticut—are not favoring local corporations at the expense of out-of-state corporations. They are favoring out-of-state corporations domiciled within the New England region over out-of-state corporations from other parts of the country, and to this extent their laws may be said to "discriminate" against the latter. But with respect to the business of banking, we do not write on a clean slate; recently in *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S., at 38, we said that "banking and related financial activities are of profound local concern." This statement is a recognition of the historical fact that our country traditionally has favored widely dispersed control of banking. While many other western nations are dominated by a handful of centralized banks, we have some 15,000 commercial banks attached to a greater or lesser degree to the communities in which they are located. The Connecticut legislative Commission that recommended adoption of the Connecticut statute in question considered

interstate banking on a regional basis to combine the beneficial effect of increasing the number of banking competitors with the need to preserve a close relationship between those in the community who need credit and those who provide credit. 4 App. in No. 84–4047 (CA2), pp. 1239–1241. The debates in the Connecticut Legislature preceding the enactment of the Connecticut law evince concern that immediate acquisition of Connecticut banks by holding companies headquartered outside the New England region would threaten the independence of local banking institutions. See, *e. g.*, App. to Pet. for Cert. A157–A160. No doubt similar concerns motivated the Massachusetts Legislature.

We think that the concerns which spurred Massachusetts and Connecticut to enact the statutes here challenged, different as they are from those which motivated the enactment of the Alabama statute in *Metropolitan*, meet the traditional rational basis for judging equal protection claims under the Fourteenth Amendment. *Barry* v. *Barchi*, 443 U. S. 55, 67 (1979); *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979).

We hold that the state statutes here in question comply with the Douglas Amendment and that they do not violate the Commerce Clause, the Compact Clause, or the Equal Protection Clause of the United States Constitution. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE O'CONNOR, concurring.

I agree that the state banking statutes at issue here do not violate the Commerce Clause, the Compact Clause, or the Equal Protection Clause. I write separately to note that I see no meaningful distinction for Equal Protection Clause purposes between the Massachusetts and Connecticut statutes we uphold today and the Alabama statute at issue in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U. S. 869 (1985).

The Court distinguishes this case from *Metropolitan Life* on the ground that Massachusetts and Connecticut favor neighboring out-of-state banks over all other out-of-state banks. It is not clear to me why completely barring the banks of 44 States from doing business is less discriminatory than Alabama's scheme of taxing the insurance companies from 49 States at a slightly higher rate. Nor is it clear why the Equal Protection Clause should tolerate a regional "home team" when it condemns a state "home team." See *id.*, at 878.

The Court emphasizes that here we do not write on a clean slate as the business of banking is "of profound local concern." *Ante*, at 177. The business of insurance is also of uniquely local concern. *Prudential Insurance Co.* v. *Benjamin*, 328 U. S. 408, 415–417 (1946). Both industries historically have been regulated by the States in recognition of the critical part they play in securing the financial well-being of local citizens and businesses. *Metropolitan Life Insurance Co.* v. *Ward*, *supra*, at 888–893 (dissenting opinion). States have regulated insurance since 1851. Like the local nature of banking, the local nature of insurance is firmly ensconced in federal law. 470 U. S., at 888–889. The McCarran-Ferguson Act, enacted in 1945, states:

> "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 59 Stat. 33, 15 U. S. C. § 1011.

The Court distinguishes the Connecticut and Massachusetts banking laws as having a valid purpose: "to preserve a close relationship between those in the community who need credit and those who provide credit." *Ante*, at 178. This interest in preserving local institutions responsive to local concerns was a cornerstone in Alabama's defense of its insur-

ance tax. It survives as one of the "15 additional purposes" the Court remanded for reconsideration. *Metropolitan Life Insurance Co.* v. *Ward*, *supra*, at 875–876, n. 5.

Especially where Congress has sanctioned the barriers to commerce that fostering of local industries might engender, this Court has no authority under the Equal Protection Clause to invalidate classifications designed to encourage local businesses because of their special contributions. Today's opinion is consistent with the longstanding doctrine that the Equal Protection Clause permits economic regulation that distinguishes between groups that *are* legitimately different—as local institutions so often are—in ways relevant to the proper goals of the State.

LOWE ET AL. *v.* SECURITIES AND EXCHANGE COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 83–1911. Argued January 7, 1985—Decided June 10, 1985

Petitioner Lowe is the president and principal shareholder of a corporation (also a petitioner) that was registered as an investment adviser under the Investment Advisers Act of 1940 (Act). Because Lowe was convicted of various offenses involving investments, the Securities and Exchange Commission (SEC), after a hearing, ordered that the corporation's registration be revoked and that Lowe not associate with any investment adviser. Thereafter, the SEC brought an action in Federal District Court, alleging that Lowe, the corporation, and two other unregistered corporations (also petitioners) were violating the Act, and that Lowe was violating the SEC's order, by publishing, for paid subscribers, purportedly semimonthly newsletters containing investment advice and commentary. After determining that petitioners' publications were protected by the First Amendment, the District Court, denying for the most part the SEC's requested injunctive relief, held that the Act must be construed to allow a publisher who is willing to comply with the Act's reporting and disclosure requirements to register for the limited purpose of publishing such material and to engage in such publishing. The Court of Appeals reversed, holding that the Act does not distinguish between person-to-person advice and impersonal advice given in publications, that petitioners were engaged in business as "investment advisers" within the meaning of the Act, and that the exclusion in § 202(a)(11)(D) of the Act from the Act's definition of covered "investment advisers" for "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation" did not apply to petitioners. Rejecting petitioners' constitutional claim, the court further held that Lowe's history of criminal conduct justified the characterization of petitioners' publications "as potentially deceptive commercial speech."

Held: Petitioners' publications fall within the statutory exclusion for bona fide publications, none of the petitioners is an "investment adviser" as defined in the Act, and therefore neither petitioners' unregistered status nor the SEC order against Lowe provides a justification for restraining the future publication of their newsletters. Pp. 190–211.

(a) The Act's legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities. Pp. 203–204.

(b) Because the content of petitioners' newsletters was completely disinterested and because they were offered to the general public on a regular schedule, they are described by the plain language of § 202(a)(11)(D)'s exclusion. The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser. Thus, petitioners' newsletters do not fit within the Act's central purpose because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public in a free, open market. Lowe's unsavory history does not prevent the newsletters from being "bona fide" within the meaning of the exclusion. In light of the legislative history, the term "bona fide" translates best to "genuine"; petitioners' publications meet this definition. Moreover, the publications are "of general and regular circulation." Although they have not been published on a regular semimonthly basis as advertised and thus have not been "regular" in the sense of consistent circulation, they have been "regular" in the sense important to the securities market. Pp. 204–209.

725 F. 2d 892, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 211. POWELL, J., took no part in the decision of the case.

Michael E. Schoeman argued the cause and filed briefs for petitioners.

Solicitor General Lee argued the cause for respondent. With him on the brief were *Deputy Solicitor General Claiborne, Daniel L. Goelzer, Paul Gonson, Jacob H. Stillman, Alan Rosenblat, David A. Sirignano,* and *Gerard S. Citera.**

*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg* and *Laurence Gold;* for the Association of American Publishers,

JUSTICE STEVENS delivered the opinion of the Court.

The question is whether petitioners may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under § 203(c) of the Investment Advisers Act of 1940 (Act), 54 Stat. 850, 15 U. S. C. § 80b–3(c).

Christopher Lowe is the president and principal shareholder of Lowe Management Corporation. From 1974 until 1981, the corporation was registered as an investment adviser under the Act.[1] During that period Lowe was convicted of misappropriating funds of an investment client, of engaging in business as an investment adviser without filing a registration application with New York's Department of Law, of tampering with evidence to cover up fraud of an investment client, and of stealing from a bank.[2] Consequently, on May 11, 1981, the Securities and Exchange Commission (Commission), after a full hearing before an Administrative Law Judge, entered an order revoking the registration of the Lowe Management Corporation, and ordering Lowe not to associate thereafter with any investment adviser.

In fashioning its remedy, the Commission took into account the fact that petitioners "are now solely engaged in the business of publishing advisory publications." The Commission noted that unless the registration was revoked, petitioners

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Inc., by *R. Bruce Rich;* and for the Reporters Committee for Freedom of the Press et al. by *Nancy J. Bregstein, Benjamin W. Boley,* and *Robert J. Brinkmann.*

Michael R. Klein filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

Harry F. Tepker, Jr., filed a brief for the North American Securities Administrators Association, Inc., as *amicus curiae.*

[1] *In re Lowe Management Corp.*, [1981 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 82,873, p. 84,321.

[2] *Id.*, at 84,321–84,323.

would be "free to engage in all aspects of the advisory business" and that even their publishing activities afforded them "opportunities for dishonesty and self-dealing."[3]

A little over a year later, the Commission commenced this action by filing a complaint in the United States District Court for the Eastern District of New York, alleging that Lowe, the Lowe Management Corporation, and two other corporations,[4] were violating the Act, and that Lowe was violating the Commission's order. The principal charge in the complaint was that Lowe and the three corporations (petitioners) were publishing two investment newsletters and soliciting subscriptions for a stock-chart service. The complaint alleged that, through those publications, the petitioners were engaged in the business of advising others "as to the advisability of investing in, purchasing, or selling securities . . . and as a part of a regular business . . . issuing reports concerning securities."[5] Because none of the petitioners was registered or exempt from registration under the Act, the use of the mails in connection with the advisory business allegedly violated § 203(a) of the Act. The Commission prayed for a permanent injunction restraining the further distribution of petitioners' investment advisory publications;

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[3] The Commission wrote:

"We do not seek to punish respondents but, in light of their egregious misconduct, we must protect the public from the future harm at their hands. In evaluating the public interest requirements in this case, we have taken into account respondents' statement that they are now solely engaged in the business of publishing advisory publications. However, respondents are still free to engage in all aspects of the advisory business. And, as the Administrative Law Judge noted, even their present activities afford numerous 'opportunities for dishonesty and self-dealing.'

"Under all the circumstances, we are convinced that the public interest requires the revocation of registrant's investment adviser registration, and a bar of Lowe from association with any investment adviser." *Id.*, at 84,324.

[4] The other two corporations are the Lowe Publishing Corporation and the Lowe Stock Chart Service, Inc.

[5] App. 18.

for a permanent injunction enforcing compliance with the order of May 11, 1981; and for other relief.[6]

Although three publications are involved in this litigation, only one need be described. A typical issue of the Lowe Investment and Financial Letter contained general commentary about the securities and bullion markets, reviews of market indicators and investment strategies, and specific recommendations for buying, selling, or holding stocks and bullion. The newsletter advertised a "telephone hotline" over which subscribers could call to get current information. The number of subscribers to the newsletter ranged from 3,000 to 19,000. It was advertised as a semimonthly publication, but only eight issues were published in the 15 months after the entry of the 1981 order.[7]

Subscribers who testified at the trial criticized the lack of regularity of publication,[8] but no adverse evidence concerning the quality of the publications was offered. There was no evidence that Lowe's criminal convictions were related to the publications;[9] no evidence that Lowe had engaged in any

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[6] *Id.*, at 23–26.

[7] *Id.*, at 32, 78–85. The Lowe Stock Advisory had only 278 paid subscribers and had published only four issues between May 1981 and its last issue in March 1982. It also analyzed and commented on the securities and bullion markets, but specialized in lower-priced stocks. Subscribers were advised that they could receive periodic letters with updated recommendations about specific securities and also could make use of the telephone hotline. 556 F. Supp. 1359, 1361 (EDNY 1983). Petitioners advertised the Lowe Chart Service as a weekly publication that would contain charts for all securities listed on the New York and American Stock Exchanges, and for the 1,200 most actively traded over-the-counter stocks, as well as charts on gold and silver prices and market indicators. Unlike the other two publications, it did not propose to offer any specific investment advice. Although there were approximately 40 subscribers, no issues were published. *Ibid.;* App. 32. The regular subscription rate was $325 for 3 months or $900 for 1 year.

[8] *Id.*, at 38, 42, 46, 58.

[9] In addition to the 1977 and 1978 convictions that gave rise to the Commission's 1981 order, in 1982, Lowe was convicted on two counts of theft by deception through the issuance of worthless checks. *Id.*, at 74–76.

trading activity in any securities that were the subject of advice or comment in the publications; and no contention that any of the information published in the advisory services had been false or materially misleading.[10]

For the most part, the District Court denied the Commission the relief it requested. 556 F. Supp. 1359, 1371 (EDNY 1983). The court did enjoin petitioners from giving information to their subscribers by telephone, individual letter, or in person, but it refused to enjoin them from continuing their publication activities or to require them to disgorge any of the earnings from the publications.[11] The District Court acknowledged that the face of the statute did not differentiate between persons whose only advisory activity is the "publication of impersonal investment suggestions, reports and analyses," and those who rendered person-to-person advice, but concluded that constitutional considerations suggested the need for such a distinction.[12] After determining that petitioners' publications were protected by the First Amendment, the District Court held that the Act must be construed to allow a publisher who is willing to comply with the existing reporting and disclosure requirements to register for the limited purpose of publishing such material and to engage in such publishing.[13]

A splintered panel of the Court of Appeals for the Second Circuit reversed. 725 F. 2d 892 (1984). The majority first

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[10] 556 F. Supp., at 1361–1362.

[11] The District Court also rejected the Commission's claim that the publications were fraudulent because they did not disclose Lowe's criminal convictions or the revocation of the registration of Lowe Management Corporation, noting that the Commission had not promulgated any rules requiring such disclosure. *Id.*, at 1371.

[12] *Id.*, at 1365.

[13] *Id.*, at 1369. The District Court wrote: "When a publisher who has been denied registration or against whom sanctions have been invoked fully complies with the record, reporting and disclosure requirements under the Act, he must be allowed to register for the purpose of publishing and to publish." *Ibid.*

held that petitioners were engaged in business as "investment advisers" within the meaning of the Act. It concluded that the Act does not distinguish between person-to-person advice and impersonal advice given in printed publications.[14] Rather, in its view, the key statutory question was whether the exclusion in § 202(a)(11)(D), 15 U. S. C. § 80b–2(a)(11)(D), for "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation" applied to the petitioners. Relying on its decision in *SEC* v. *Wall Street Transcript Corp.*, 422 F. 2d 1371, cert. denied, 398 U. S. 958 (1970), the Court of Appeals concluded that the exclusion was inapplicable.[15]

Next, the Court of Appeals rejected petitioners' constitutional claim, reasoning that this case involves "precisely the kind of regulation of commercial activity permissible under the First Amendment."[16] Moreover, it held that Lowe's history of criminal conduct while acting as an investment adviser justified the characterization of his publications "as potentially deceptive commercial speech."[17] The Court of Appeals reasoned that a ruling that petitioners "may not sell their views as to the purchase, sale, or holding of certain securities is no different from saying that a disbarred lawyer may not sell legal advice."[18] Finally, the court noted that its holding was limited to a prohibition against selling advice to clients about specific securities.[19] Thus, the Court of

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[14] 725 F. 2d, at 896–897.

[15] *Id.*, at 898.

[16] *Id.*, at 900. The court additionally rejected petitioners' claim that "the Act violates equal protection by subjecting investment newsletters, but not bona fide newsletters, to regulation." *Id.*, at 900, n. 5.

[17] *Id.*, at 901.

[18] *Id.*, at 902.

[19] At the end of its opinion, the Court of Appeals wrote:

"Finally, we note what this holding does not entail. Lowe is not prohibited from publishing or stating his views as to any matter of current interest, economic or otherwise, such as the likelihood of war, the trend in interest rates, whether the next election will affect market conditions,

Appeals apparently assumed that petitioners could continue publishing their newsletters if their content was modified to exclude any advice about specific securities.[20]

One judge concurred separately, although acknowledging his agreement with the court's opinion.[21] The dissenting judge agreed that Lowe may not hold himself out as a registered investment adviser and may not engage in any fraudulent activity in connection with his publications, but concluded that the majority had authorized an invalid prior restraint on the publication of constitutionally protected speech. To avoid the constitutional question, he would have adopted the District Court's construction of the Act.[22]

I

We granted certiorari to consider the important constitutional question whether an injunction against the publication

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or whether future enforcement of the Anti-Dumping Act to protect basic American smokestack industry from foreign competition is likely. He is not prohibited from publishing a newspaper of general interest and circulation. Nor is he prohibited from publishing recommendations in somebody else's bona fide newspaper as an employee, editor, or writer. What he is prohibited from doing is selling to clients advice and counsel, analysis and reports as to the value of specific securities or as to the advisability of investing in, purchasing or selling or holding specific securities." *Ibid.* It appended the following footnote:

"We leave to another day the question whether a publication dealing only with market indicators generally or making recommendations only as to groups of securities (e. g., air transport, beverages-brewers, mobile homes) could be barred on facts such as those of this case." *Id.*, at 902, n. 7.

[20] The Court of Appeals did not explain whether its apparent unwillingness to grant the Commission all of the relief requested was based on its opinion that a modification in the content of the publication would avoid the statutory definition of "investment adviser" or on the assumption that petitioners have a constitutional right to publish newsletters omitting specific recommendations.

[21] *Id.*, at 902–903.

[22] *Id.*, at 903.

and distribution of petitioners' newsletters is prohibited by the First Amendment. 469 U. S. 815 (1984).[23] Petitioners contend that such an injunction strikes at the very foundation of the freedom of the press by subjecting it to license and censorship, see, *e. g.*, *Lovell* v. *City of Griffin*, 303 U. S. 444, 451 (1938). Brief for Petitioners 15–19. In response the Commission argues that the history of abuses in the securities industry amply justified Congress' decision to require the registration of investment advisers, to regulate their professional activities, and, as an incident to such regulation, to prohibit unregistered and unqualified persons from engaging in that business. Brief for Respondent 10; cf. *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 50–51 (1961). In reply, petitioners acknowledge that person-to-person communication in a commercial setting may be subjected to regulation that would be impermissible in a public forum, cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455 (1978), but contend that the regulated class—investment advisers—may not be so broadly defined as to encompass the distribution of impersonal investment advice and commentary in a public market. Reply Brief for Petitioners 1–4.

In order to evaluate the parties' constitutional arguments, it is obviously necessary first to understand, as precisely as possible, the extent to which the Act was intended to regu-

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[23] Petitioners' submission in this Court does not challenge the validity of the Commission's order revoking the registration of Lowe Management Corporation and barring Lowe from future association with an investment adviser. Section 203(e) of the Act, 15 U. S. C. § 80b–3(e), authorizes the Commission to revoke the registration of any investment adviser if it finds, after notice and an opportunity for hearing, that such revocation is in the public interest and that the investment adviser has committed certain types of crimes. Section 203(f), 15 U. S. C. § 80b–3(f), authorizes the Commission to bar the association of any person with an investment adviser if he has committed acts that would justify the revocation of an investment adviser's registration. Moreover, petitioners do not challenge the District Court's holding that they may not operate a direct "hot line" for subscribers desiring personalized advice.

late the publication of investment advice and the reasons that motivated Congress to authorize such regulation. Moreover, in view of the fact that we should "not decide a constitutional question if there is some other ground upon which to dispose of the case,"[24] and the further fact that the District Court and the dissenting judge in the Court of Appeals both believed that the case should be decided on statutory grounds, a careful study of the statute may either eliminate, or narrowly limit, the constitutional question that we must confront. We therefore begin with a review of the background of the Act with a particular focus on the legislative history describing the character of the profession that Congress intended to regulate.

II

As we observed in *SEC* v. *Capital Gains Research Bureau, Inc.*, the "Investment Advisers Act of 1940 was the last in a series of acts designed to eliminate certain abuses in the securities industry, abuses which were found to have contributed to the stock market crash of 1929 and the depression of the 1930's."[25] The Act had its genesis in the Public Utility Holding Company Act of 1935, which "authorized and directed" the Commission "to make a study of the functions and activities of investment trusts and investment companies . . . and to report the results of its study and its recommendations to the Congress on or before January 4, 1937."[26] Pursuant to this instruction, the Commission transmitted to Congress its study on investment counsel, investment management, investment supervisory, and investment advisory services.[27]

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[24] *Escambia County, Florida* v. *McMillan*, 466 U. S. 48, 51 (1984) *(per curiam);* see also *Atkins* v. *Parker, ante,* at 123; *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring).

[25] 375 U. S. 180, 186 (1963) (footnote omitted).

[26] 49 Stat. 837.

[27] See Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public

The Report focused on "some of the more important problems of these investment counsel organizations";[28] significantly, the Report stated that it "was intended to exclude any person or organization which was engaged in the business of furnishing investment analysis, opinion, or advice solely through publications distributed to a list of subscribers and did not furnish specific advice to any client with respect to securities."[29]

The Report traced the history and growth of investment counsel, noting that the profession did not emerge until after World War I.[30] In the 1920's "a distinct class of persons . . . held themselves out as giving only personalized investment advisory service"; rapid growth began in 1929, and markedly increased in the mid-1930's in response "to the demands of the investing public, which required supervision of its security investments after its experience during the depression years."[31]

Utility Holding Company Act of 1935, Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H. R. Doc. No. 477, 76th Cong., 2d Sess. (1939) (hereinafter cited as Report).

[28] *Id.*, at III.

[29] *Id.*, at 1.

[30] *Id.*, at 3.

[31] *Id.*, at 5. After detailing the geographic distribution, the forms, and the sizes of investment-counsel firms, the Report analyzed the affiliations of the firms. It noted that "[a]ll investment counsel firms have not restricted their business interests or activities to the supervision of the accounts of their investment clients." *Id.*, at 11. Of the investment-counsel firms surveyed, approximately 5% published investment manuals and periodicals; of these latter firms, 80% were without investment-company clients. *Ibid.* The Commission posited that affiliations with publishers of investment manuals and periodicals "may be attributable to the fact that research and statistical organizations are not uncommon with these businesses." *Id.*, at 12. The Report also analyzed the nature of services of investment-counsel firms to their clients:

"The powers of investment counsel firms with respect to the management of the funds of their investment company clients were either dis-

Regarding the functions of investment counselors, the Report stated that "[s]ome of the representatives of investment counsel firms urged that the primary function of investment counselors was 'to render to clients, on a personal basis, competent, unbiased, and continuous advice regarding the sound management of their investments.'"[32] Nevertheless, it noted that one investment counselor conceded:

> "[Y]ou have a gradation from individuals who are professed tipsters and do not make any pretense of being anything else, all the way up the scale to the type of individual, who, as you say, desires to give the impartial scientific professional advice to persons who are trying to plan their economic situation in the light of accomplishing various results, making provision for old age, education, and so forth. However, you can readily see . . . that a very significant part of that problem, as far as we are concerned, and possibly the most vital one, is, shall we say, the individuals on the fringes. . . ."[33]

Representatives of the industry viewed the functions of investment counselors slightly differently, concluding that they should serve "individuals and institutions with substantial funds who require continuous supervision of their investments and a program of investment to cover their entire eco-

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cretionary or advisory. Discretionary powers imply the vesting with an investment counsel firm control over the client's funds, with the power to make the ultimate determination with respect to the sale and purchase of securities for the client's portfolio. In contrast, vesting advisory powers with an investment counsel firm merely means that the firm may make recommendations to its client, with whom rests the ultimate power to accept or reject such recommendations." *Id.*, at 13.

Approximately one-third of the firms surveyed had discretionary powers, *ibid.*; however, all firms surveyed rarely assumed "custody of the portfolio securities of their investment company clients," *id.*, at 15.

[32] *Id.*, at 23.

[33] *Id.*, at 25.

nomic needs."[34] Turning to the problems of investment counselors, the Report concluded that they fell within two categories: "(a) the problem of distinguishing between bona fide investment counselors and 'tipster' organizations; and (b) those problems involving the organization and operation of investment counsel institutions."[35]

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[34] *Ibid.* Moreover, the representatives pointed out that there was a difference between the functions of investment counselors and investment companies:

". . . [T]he ordinary investment trust of the management type gives its holder a diversification, probably beyond the ability of the small investor to obtain on his own capital. It also gives him management. It does not take any cognizance—the distinction is that it takes no cognizance of his total financial position in investing his money for him, and is distinguished from investment counsel, in that it gives him no judgment in the matter whatever. . . .

"Q. *Now, you say the true function as you conceive it, of an investment counselor, is to give advice in connection with the specific condition of a particular individual?*

"A. *Yes.*

"Q. *While the investment trust does not have that personal element in it, that it manages the funds more on an impersonal basis?*

"A. *That is right.*

"Q. 'Impersonal' being used in the sense that they may try to get a common denominator, or what they envision their stockholders' condition may be, or what would be best for a cross-section of the American public, but does not give the advice with the peculiar, particular, specific financial condition of the individual and what he hopes to accomplish, or what purpose.

"A. Might I also add that in a number of cases at least, as Mr. Dunn said yesterday, the investment trust managers do not consider their funds as a proper repository for all of an individual's capital. It is not that it doesn't consider only his personal peculiarities and needs, but it does not give him a complete financial program." *Id.*, at 26–27 (testimony of James N. White of Scudder, Stevens & Clark) (emphasis added).

[35] *Id.*, at 27. Moreover, industry representatives "felt that investment counsel organizations could not completely perform their basic function—furnishing to clients on a personal basis competent, unbiased, and continuous advice regarding the sound management of their investments—unless

The Commission's work "culminated in the preparation and introduction by Senator Wagner of the bill which, with some changes, became the Investment Advisers Act of 1940."[36] Senator Wagner's bill, S. 3580, contained two Titles; the first, concerning investment companies, contained a definition of "investment adviser,"[37] but the second, concerning investment advisers, did not. After the introduction of S. 3580, a Senate Subcommittee held lengthy hearings at which numerous statements concerning investment advisers

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all conflicts of interest between the investment counsel and the client were removed." *Id.*, at 28. The Report, near its conclusion, summarized:

"It was the unanimous opinion of the representatives at the public examination . . . that, although a voluntary organization would serve some salutary purpose, such an organization could not cope with the most elemental and fundamental problem of the investment counsel industry—the investment counsel 'fringe' which includes those incompetent and unethical individuals or organizations who represent themselves as bona fide investment counselors. These individuals and organizations not only could not meet the requirements of membership, but because of the nature of their activities would not even consider voluntarily submitting to supervision or policing." *Id.*, at 34.

[36] *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S., at 189.

[37] S. 3580 contained the following definition of "investment adviser":

"'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a bank; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) the publisher of any bona fide newspaper or newsmagazine of general circulation; or (D) such other persons, not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." Hearings on S. 3580 before the Subcommittee on Securities and Exchange of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., pt. 1, p. 27 (1940) (Senate Hearings).

It is noteworthy that the exclusion for publishers in clause (C) in S. 3580 is not as broad as the exclusion in the final draft of the Act. See n. 43, *infra*.

were received.[38] One witness distinguishing the investment-counsel profession from investment firms and businesses, explained:

> "*It is a personal-service profession and depends for its success upon a close personal and confidential relationship between the investment-counsel firm and its client. It requires frequent and personal contact of a professional nature between us and our clients.* . . .
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> . . . . . .
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> "*We must establish with each client a relationship of trust and confidence designed to last over a period of*

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[38] Douglas T. Johnston, Vice President of the Investment Counsel Association of America, stated in part:

"The definition of 'investment adviser' as given in the bill, in spite of certain exclusions, is quite broad and covers a number of services which are entirely different in their scope and in their methods of operation. For example, as we read the definition, among others, it would include those companies which publish manuals of securities such as Moody's, Poor's, and so forth; it would include those companies issuing weekly investment letters such as Babson's, United Business Service, Standard Statistics, and so forth; it would include those tipsters who through newspaper advertisements offer to send, for a nominal price, a list of stocks that are sure to go up; it would include certain investment banking and brokerage houses which maintain investment advisory departments and make charges for services rendered; and finally it would include those firms which operate on a professional basis and which have come to be recognized as investment counsel.

"Just why it is thought to be in the public interest at this time to require all the above services to register with, and be regulated by, the Federal Government we do not know.

. . . . . .

"I have mentioned certain important exceptions or exclusions in the definition of 'investment advisers'; one of the principal of these is lawyers. Probably in the aggregate more investment advice is given by lawyers than by all other advisers combined. I only want to point out that in so acting they are not functioning strictly as lawyers. So far as I know, no courses on investments are part of a law school curriculum, nor in passing bar examinations does a lawyer have to pass a test on investment." Senate Hearings 711–712.

time because economic forces work themselves out slowly. Business and investment cycles last for years and our investment plans have to be similarly long-range. No investment counsel firm could long remain in business or be of real benefit to clients except through such long-term associations. . . .

". . . Judgment of the client's circumstances and of the soundness of his financial objectives and of the risks he may assume. Judgment is the root and branch of the decisions to recommend changes in a client's security holdings. If the investment counsel profession, as we have described it, could not offer this kind of judgment with its supporting experience and information, it would not have anything to sell that could not be bought in almost any bookstore. . . .

"Furthermore, our clients are not unsophisticated in financial matters. They are resourceful men and women of means who are very critical in their examination of our performance. If they disapprove of our activities, they cancel their contracts with us, which eliminates our only source of income.

. . . . .

"We are quite clearly not 'hit and run' tipsters, nor do we deal with our clients at arms' length through the advertising columns of the newspapers or the mails; in fact, we regard it as a major defeat if we are unable to have frequent personal contact with a client and with his associates and dependents. We do not publish for general distribution a statistical service or compendium of general economic observations or financial recommendations. To use a hackneyed phrase, our business is 'tailor-made.'"[39]

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[39] *Id.*, at 713–716 (testimony of Charles M. O'Hearn) (emphasis added); see also *id.*, at 719 ("The relationship of investment counsel to his client is essentially a personal one involving trust and confidence. The investment counselor's sole function is to render to his client professional advice concerning the investment of his funds in a manner appropriate to that client's

David Schenker, Chief Counsel of the Commission's Investment Trust Study, summarized the extent of the proposed legislation: "If you have been convicted of a crime, you cannot be an investment counselor and you cannot use the mails to perpetrate a fraud," Senate Hearings 996. Schenker provided the Subcommittee with a significant report[40] prepared by the Research Department of the Illinois Legislative Council. *Ibid.* Referring to possible regulation of investment counselors in the State of Illinois, the report stated in part:

> "Regulatory statutes concerning investment counselors appear to exempt from their provisions those who furnish advice without remuneration or valuable consideration, apparently because it is thought impracticable to regulate such gratuitous services. Newspapers and journals generally also seem to be excluded although this is not explicitly stated in the statutes, the exemption apparently being based on general constitutional and legal principles.
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needs") (statement of Alexander Standish); *id.*, at 724 (the "function of rendering to clients—on a personal, professional basis—competent, unbiased, and continuous advice regarding the sound management of their investments, has had a steady growth") (statement of Dwight C. Rose, President, Investment Counsel Association of America); *id.*, at 750 ("Investment counsel have sprung into being in response to the requirements of individuals for individual personal advice with respect to the handling of their affairs . . . the whole genesis of investment counseling is a personal professional relationship") (testimony of Rudolf P. Berle, General Counsel, Investment Counsel Association of America).

[40] It should be noted that the Illinois report was submitted by Schenker on April 26, 1940, more than three weeks after the statement quoted by JUSTICE WHITE, *post*, at 219. Contrary to JUSTICE WHITE's suggestion, there is nothing in the legislative history to indicate that Congress rejected the report's proposed distinction between advice distributed solely "to a list of subscribers" and advice to "clients." It is undisputed that Congress broadened the scope of the "bona fide publications" exclusion after the Commission submitted the Illinois report. See n. 37, *supra*, and n. 43, *infra*.

"*A particular problem in defining the application of a law regulating investment counselors arises from the existence of individuals and firms who furnish investment advice solely by means of publications. Insofar as such individuals and firms also render specialized advice to individual clients, they might be subject to any regulatory measure that may be adopted.* The question arises, however, as to whether or not services which give the same general advice to all their clients, by means of some circular or other publication, are actually engaged in a type of investment counseling as to which regulation is feasible.

. . . . .

"These investment services which function through publications sent to their subscribers, rather than through individualized advice, would present several difficulties not found in regulating investment counselors generally. In the first place, the large number of agencies publishing investment facts and interpretations is well known, and a very large administrative staff would be required to enforce detailed registration. Secondly, such information is supplied both by newspapers and by specialized financial journals and services. *The accepted rights of freedom of the press and due process of law might prevent any general regulation and perhaps also supervision over particular types of publications, even if the advertisements of these publications occasionally quite exaggerate the value of the factual information which is supplied. That the constitutional guarantee of liberty of the press is applicable to publications of all types, and not only to newspapers, has been clearly indicated by the United States Supreme Court* [citing *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938)]. . . .

. . . . .

"To the problem of formulating reasonable and practicable regulations for the factual services must, accordingly, be added the legal and constitutional difficulties inherent in the attempted regulation of any individual or

organization functioning primarily by means of published circulars and volumes. However, liberty of the press is not an absolute right, and some types of regulation may be both constitutional and feasible, assuming that regulation of some sort is thought desirable. Such regulation could probably not legally take the form of licensing publications or prohibiting certain types of publications. Regulation of the publishing of investment advice in order to conform with constitutional requirements, would probably have to be confined to punishing, by civil or criminal penalties, those who perpetrate or attempt to perpetrate frauds or other specific acts declared to be contrary to law.

. . . . . .

"*It may be thought desirable specifically to exclude from regulation the publishers of generalized investment information, along with those who furnish economic advice generally. This may be done by carefully defining the term 'investment counselor' so as to exclude 'any person or organization which engages in the business of furnishing investment analysis, opinion, or advice solely through publications distributed to a list of subscribers and not furnishing specific advice to any client with respect to securities, and also persons or organizations furnishing only economic advice and not advice relating to the purchase or sale of securities.'*"[41]

After the Senate Subcommittee hearings on S. 3580, and after meetings attended by representatives of investment-adviser firms, a voluntary association of investment advisers, and the Commission, a revised bill, S. 4108, was reported by the Senate Committee on Banking and Currency. In the Report accompanying the revised bill, the Committee on Banking and Currency wrote:

"Not only must the public be protected from the frauds and misrepresentations of unscrupulous tipsters and

[41] *Id.*, at 1007–1009 (emphasis added) (footnotes omitted).

touts, but the bona fide investment adviser must be safeguarded against the stigma of the activities of these individuals. Virtually no limitations or restrictions exist with respect to the honesty and integrity of individuals who may solicit funds to be controlled, managed, and supervised. Persons who may have been convicted or enjoined by courts because of perpetration of securities fraud are able to assume the role of investment advisers.

. . . . . .

"Title II recognizes that with respect to a certain class of investment advisers, a type of personalized relationship may exist with their clients. As a consequence, this relationship is a factor which should be considered in connection with the enforcement by the Commission of the provisions of this bill." [42]

S. 4108 was introduced before the House of Representatives as H. R. 10065.[43] After additional hearings,[44] the

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[42] S. Rep. No. 1775, 76th Cong., 3d Sess., 21–22 (1940) (emphasis added).

[43] Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 1 (1940). The bill contained two definitions of "investment adviser," one in Title I (investment companies) and the other in Title II (investment advisers). The latter definition read, in part:

"'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation. . . ." *Id.*, at 45.

Whereas the exclusion for publishers in clause (C) of the exclusion in S. 3580 only mentioned newspapers of general circulation, the exclusion in clause (D) of H. R. 10065 includes newspapers "of general and regular circulation" and also encompasses "business or financial" publications. See n. 37, *supra*.

[44] Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess.

Committee on Interstate and Foreign Commerce wrote in its Report accompanying the bill:

> "The essential purpose of Title II of this bill is to protect the public from the frauds and misrepresentations of unscrupulous tipsters and touts and to safeguard the honest investment adviser against the stigma of the activities of these individuals by making fraudulent practices by investment advisers unlawful. *The title also recognizes the personalized character of the services of investment advisers and especial care has been taken in the drafting of the bill to respect this relationship between investment advisers and their clients.*"[45] (Emphasis added.)

(1940). During the hearings, testimony about the personal nature of the investment-counseling profession was again emphasized:

"When the hearings were held on this bill before the Senate committee the association opposed it. We opposed it for three general reasons: First, in the original bill there was a confusion between investment counsel and investment trusts. We felt that the personal confidential relationship existing between investment counsel and his client was so very different from the commodity of investment trust shares which investment trusts were engaged in selling, that any legislation to regulate these two different activities should be incorporated in separate acts. In the bill we felt that our clients were not properly protected in their confidential relationship. . . .

. . . . . .

"Following the hearings before the Senate subcommittee, we had conferences with the Securities and Exchange Commission, and all of our objections have been satisfactorily adjusted. . . .

. . . . . .

"The Investment Counsel Association of America unqualifiedly endorses the present bill." *Id.*, at 92 (statement of Dwight Rose, representing Investment Counsel Association of America, New York, N. Y.).

[45] H. R. Rep. No. 2639, 76th Cong., 3d Sess., 28 (1940). The terms "investment counsel," "investment counselor," and "investment adviser" were used interchangeably throughout the legislative history. That the terms were understood to share a common definition is best demonstrated by the testimony of the Commission's David Schenker. While describing the Commission's initial report to Congress, he stated that "we learned of the existence of 394 investment counselors." Senate Hearings 48. On

The definition of "investment adviser" included in Title II when the Act was passed, 54 Stat. 848–849, is in all relevant respects identical to the definition before the Court today.[46]

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the very next page of the hearings, he stated that "we learned of the existence of 394 investment advisers." *Id.*, at 49. JUSTICE WHITE, however, *post*, at 221–223, n. 7, correctly observes that the statutory definition of an "adviser" encompasses persons who would not qualify as investment counsel because they are not primarily engaged in the business of rendering "*continuous* advice as to the investment of funds. . . ." 15 U. S. C. § 80b–2(a)(13) (emphasis added). But it does not follow, as JUSTICE WHITE seems to assume, that the term "investment adviser" includes persons who have no personal relationship at all with their customers. The repeated use of the term "client" in the statute, see n. 54, *infra*, contradicts the suggestion that a person who is merely a publisher of nonfraudulent information in a regularly scheduled periodical of general circulation has the kind of fiduciary relationship the Act was designed to regulate.

[46] According to JUSTICE WHITE, witness James White "specifically explained to Representative Boren that persons whose advice was furnished solely through publications were *not* excepted from the class of investment advisers as defined in the Act." *Post*, at 220 (emphasis in original). This is incorrect. Representative Boren asked a question based on his reading of the separate definition of "investment adviser" in Title I, which concerned investment companies. In response, White indicated to Boren that he was reading the wrong definition; White then quoted the basic definition of "investment adviser" from Title II, and only answered the question whether there were separate definitions under the two Titles. The relevant colloquy reads as follows:

"Mr. Boren: If I read the bill correctly, a person whose advice is furnished solely through publications distributed through subscribers in the form of publications, they are specifically exempted.

"Now, should that person be exempted who puts out a monthly or weekly newspaper, we will say, advising people on that?

"Mr. White. Will you be kind enough to give the page from which you are reading?

"Mr. Boren. Well, it is on page 154. I am reading from page 12, in the definitions of investment advisers *from this other bill.* It is a little different in page numbers in this bill.

"Mr. Healy. May I suggest that there is a second definition.

"Mr. White. *That is an investment adviser of an investment company, which is different from an investment adviser in title II.*

III

The basic definition of an "investment adviser" in the Act reads as follows:

> "'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . ."[47]

Petitioners' newsletters are distributed "for compensation and as part of a regular business" and they contain "analyses or reports concerning securities." Thus, on its face, the

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"Mr. Boren. I see.

"Mr. White [reading the definition from the bill]. An investment adviser in title II means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

"Mr. Boren. Then there is a distinct separation of investment advisers under the two different sections of the bill.

"Mr. White. Yes.

"Mr. Boren. Then that clarifies it for me, Mr. Chairman. I thank you.

"Mr. Cole. I believe that is all, Mr. White. Thank you.

"Mr. White. Thank you." Hearings on H. R. 10065, *supra*, at 90–91 (emphasis added).

It should also be noted that the last item from the 1940 legislative history that JUSTICE WHITE uses to support his interpretation of the Act is language from S. Rep. No. 1775. See *post*, at 221. The language should be read in the context of all the legislative history, and particularly in the context of H. R. Rep. No. 2639, which followed S. Rep. No. 1775 and which accompanied the final version of the Act before passage. The later Report stated unambiguously: "The title . . . recognizes the personalized character of the services of investment advisers." H. R. Rep. No. 2639, at 28.

[47] 15 U. S. C. § 80b–2(a)(11).

basic definition applies to petitioners. The definition, however, is far from absolute. The Act excludes several categories of persons from its definition of an investment adviser, lists certain investment advisers who need not be registered, and also authorizes the Commission to exclude "such other person" as it may designate by rule or order.[48]

One of the statutory exclusions is for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[49] Although neither the text of the Act nor its legislative history defines the precise scope of this exclusion, two points seem tolerably clear. Congress did not intend to exclude publications that are distributed by investment advisers as a normal part of the business of servicing their clients. The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.

Congress was undoubtedly aware of two major First Amendment cases that this Court decided before the enactment of the Act. The first, *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931), established that "liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action." *Id.*, at 707. In *Near*, the Court emphatically stated that the "chief purpose" of the press guarantee was "to prevent previous restraints upon publication," *id.*, at 713, and held that the Minnesota nuisance statute at issue in that case was unconstitutional because it authorized a prior restraint on publication.

Almost seven years later, the Court decided *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), a case that was expressly

[48] §§ 80b–2(a)(11)(F), 80b–3(b), 80b–6a.

[49] § 80b–2(a)(11)(D).

noted by the Commission during the Senate Subcommittee hearings. In striking down an ordinance prohibiting the distribution of literature within the city without a permit, the Court wrote:

> "We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish '*without* a license what formerly could be published only *with* one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision. . . .
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> "The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from every sort of infringement need not be repeated. *Near* v. *Minnesota*. . . ." *Id.*, at 451–452 (emphasis in original) (footnote omitted).

The reasoning of *Lovell*, particularly since the case was cited in the legislative history, supports a broad reading of the exclusion for publishers.[50]

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[50] "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon* v. *University of Chicago*, 441

The exclusion itself uses extremely broad language that encompasses any newspaper, business publication, or financial publication provided that two conditions are met. The publication must be "bona fide," and it must be "of regular and general circulation." Neither of these conditions is defined, but the two qualifications precisely differentiate "hit and run tipsters" and "touts" from genuine publishers. Presumably a "bona fide" publication would be genuine in the sense that it would contain disinterested commentary and analysis as opposed to promotional material disseminated by a "tout." Moreover, publications with a "general and regular" circulation would not include "people who send out bulletins from time to time on the advisability of buying and selling stocks," see Hearings on H. R. 10065, at 87, or "hit and run tipsters."[51] *Ibid.* Because the content of petitioners' newsletters was completely disinterested, and because they were offered to the general public on a regular schedule, they are described by the plain language of the exclusion.

The Court of Appeals relied on its opinion in *SEC* v. *Wall Street Transcript Corp.*, 422 F. 2d 1371 (CA2), cert. denied,

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U. S. 677, 696–697 (1979). Moreover, "[i]n areas where legislation might intrude on constitutional guarantees, we believe that Congress, which has always sworn to protect the Constitution, would err on the side of fundamental constitutional liberties when its legislation implicates those liberties." *Regan* v. *Time, Inc.*, 468 U. S. 641, 697 (1984) (STEVENS, J., concurring in part and dissenting in part).

[51] The term "tipsters" is explained in the testimony of Douglas T. Johnston, n. 38, *supra*—persons "who through newspaper advertisements offer to send, for a nominal price, a list of stocks that are sure to go up." JUSTICE WHITE is unable "to imagine" any workable definition of the exclusion "that does not sweep in all publications that are not personally tailored to individual clients," *post*, at 216. The definition Congress actually wrote, however, does not sweep in bulletins that are issued from time to time in response to episodic market activity, advertisements that "tout" particular issues, advertised lists of stocks "that are sure to go up" that are sold to individual purchasers, or publications distributed as an incident to personalized investment service.

398 U. S. 958 (1970), to hold that petitioners were not bona fide newspapers and thus not exempt from the Act's registration requirement. In *Wall Street Transcript*, the majority held that the "phrase 'bona fide' newspapers . . . means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred." It reasoned that whether "a given publication fits within this exclusion must depend upon the nature of its practices rather than upon the purely formal 'indicia of a newspaper' which it exhibits on its face and in the size and nature of its subscription list." 422 F. 2d, at 1377. The court expressed its concern that an investment adviser "might choose to present [information to clients] in the guise of traditional newspaper format." *Id.*, at 1378. The Commission, citing *Wall Street Transcript*, has interpreted the exclusion to apply "only where, based on the content, advertising material, readership and other relevant factors, a publication is not primarily a vehicle for distributing investment advice."[52]

These various formulations recast the statutory language without capturing the central thrust of the legislative history, and without even mentioning the apparent intent of Congress to keep the Act free of constitutional infirmities.[53] The Act was designed to apply to those persons

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[52] Investment Advisers Act Release No. 563, 42 Fed. Reg. 2953, n. 1 (1977) (codified at 17 CFR § 276 (1984)). The Commission's reformulation of the definition of the exclusion was not drafted until 1977—37 years after the passage of the Act—and therefore is not entitled to the deference due a contemporaneous construction of the Act. *SEC* v. *Sloan*, 436 U. S. 103, 117 (1978). JUSTICE WHITE attaches significance to the fact that in the first year of the Act's operation, 165 publishers of investment advisory services registered under the Act. *Post*, at 215. The fact that those firms deemed it advantageous to register does not demonstrate that the statute required them to do so.

[53] The Commission's focus on the content of the publication to determine whether a publisher is within the exclusion represents a dramatic depar-

engaged in the investment-advisory profession—those who provide personalized advice attuned to a client's concerns, whether by written or verbal communication.[54] The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser. Thus, petitioners' publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public at large in a free, open market—a public forum in which typically anyone may express his views.

The language of the exclusion, read literally, seems to describe petitioners' newsletters. Petitioners are "publishers of any bona fide newspaper, news magazine or business or financial publication." The only modifier that might arguably disqualify the newsletters are the words "bona fide." Notably, however, those words describe the publication rather than the character of the publisher; hence Lowe's unsavory history does not prevent his newsletters from being "bona fide." In light of the legislative history, this phrase translates best to "genuine"; petitioners' publications meet

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ture from the objective criteria in the statute itself. As far as content is concerned, the statutory exclusion broadly encompasses every "business or financial publication" but then limits the category by a requirement that it be "bona fide," and a further requirement that it be "of general and regular circulation." JUSTICE WHITE makes no attempt to explain the meaning of either of these requirements, *post*, at 215–216, but, instead, merely emphasizes the breadth of the basic definition of an investment adviser, *post*, at 216–219, which admittedly is broad enough to encompass publishers. However, the basic definition must be read together with the exclusion in order to locate the place where Congress drew the line; in other words, we must give effect to every word that Congress used in the statute.

[54] It is significant that the Act repeatedly refers to "clients," not "subscribers." See, *e. g.*, 15 U. S. C. §§ 80b–1(1), 80b–3(b)(1), 80b–3(b)(2), 80b–3(b)(3), 80b–3(c)(1)(E), 80b–6(1), 80b–6(2), 80b–6(3).

this definition: they are published by those engaged solely in the publishing business and are not personal communictions masquerading in the clothing of newspapers, news magazines, or financial publications. Moreover, there is no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest. Further, petitioners' publications are "of general and regular circulation."[55] Although the publications have not been "regular" in the sense of consistent circulation, the publications have been "regular" in the sense important to the securities market: there is no indication that they have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry.[56]

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[55] JUSTICE WHITE relies on the testimony of witness James White to support his interpretation of the legislative history. *Post*, at 219–220. However, significantly, White stated that the term "investment adviser" includes "*people who send out bulletins from time to time on the advisability of buying or selling stocks.*" Such people would not fit within the exclusion for bona fide publications of regular and general circulation. Tipsters who send out bulletins from time to time on the advisability of buying or selling stocks presumably would not satisfy the requirement of "general and regular circulation" and would fall within the basic definition of investment adviser. Thus, we do not agree with JUSTICE WHITE's assumption that petitioners should be equated with distributors of "tout sheets," *post*, at 217, n. 3. Additionally, it is extremely doubtful that any "tipsheet" or "tout sheet" could be a "bona fide," *i. e.*, genuine, publication so as to claim the benefits of the exclusion.

[56] Without actually determining how the exception is "supposed to mesh" with the basic definition, *post*, at 215, and without any consideration of the "general and regular" publication requirement, JUSTICE WHITE would adopt an extremely narrow, content-based, interpretation of the exclusion in order to preserve the Commission's ability to deal with the practice of "scalping," *post*, at 224. That practice is, of course, most dangerous when engaged in by a publication with a large circulation—perhaps by a columnist in an admittedly exempt publication. Cf. *Zweig* v. *Hearst Corp.*, 594 F. 2d 1261 (CA9 1979). Moreover, it is incorrect to assume that the only remedies against scalping are found in the Act. The mail-fraud statute

The dangers of fraud, deception, or overreaching that motivated the enactment of the statute are present in personalized communications but are not replicated in publications that are advertised and sold in an open market.[57] To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications,[58] a matter that concerned Congress when the exclusion was drafted. The content of the publications and the audience to which they are directed in this case reveal the specific limits of the exclusion. As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act.[59]

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would certainly be available for many violations, and the SEC has recently had success using Rule § 10b–5 against a newsletter publisher. See *SEC* v. *Blavin*, 557 F. Supp. 1304 (ED Mich. 1983), aff'd, 760 F. 2d 706 (CA6 1985).

[57] Cf. *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). It is significant that the Commission has not established that petitioners have had authority over the funds of subscribers; that petitioners have been delegated decisionmaking authority to handle subscribers' portfolios or accounts; or that there have been individualized, investment-related interactions between petitioners and subscribers.

[58] Moreover, because we have squarely held that the expression of opinion about a commercial product such as a loudspeaker is protected by the First Amendment, *Bose Corp.* v. *Consumers Union of U. S., Inc.*, 466 U. S. 485, 513 (1984), it is difficult to see why the expression of an opinion about a marketable security should not also be protected.

[59] The Commission suggests that an investment adviser may regularly provide, in newsletter form, advice to several clients based on recent developments, without tailoring the advice to each client's individual

We therefore conclude that petitioners' publications fall within the statutory exclusion for bona fide publications and that none of the petitioners is an "investment adviser" as defined in the Act. It follows that neither their unregistered status, nor the Commission order barring Lowe from associating with an investment adviser, provides a justification for restraining the future publication of their newsletters. It also follows that we need not specifically address the constitutional question we granted certiorari to decide.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in the result.

The issue in this case is whether the Securities and Exchange Commission may invoke the injunctive remedies of the Investment Advisers Act, 15 U. S. C. §§80b–1 to 80b–21, to prevent an unregistered adviser from publishing newsletters containing investment advice that is not specifically tailored to the needs of individual clients. The Court holds that it may not because the activities of petitioner Lowe (hereafter petitioner) do not make him an investment adviser covered by the Act. For the reasons that follow, I disagree with this improvident construction of the statute. In my view, petitioner is an investment adviser subject to regulation and sanction under the Act. I concur in the judgment, however, because to prevent petitioner from publishing at all is inconsistent with the First Amendment.

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needs, and that this is the practice of investment advising. Brief for Respondent 34, n. 44. However, the Commission does not suggest that this "practice" is involved here; thus, we have no occasion to address this concern.

I

A

I have no quarrel with the principle that constitutional adjudication is to be avoided where it is fairly possible to do so without negating the intent of Congress. Due respect for the Legislative Branch requires that we exercise our power to strike down its enactments sparingly. For this reason, "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

But our duty to avoid constitutional questions through statutory construction is not unlimited: it is subject to the condition that the construction adopted be "fairly possible." As Chief Justice Taft warned, "amendment may not be substituted for construction, and . . . a court may not exercise legislative functions to save the law from conflict with constitutional limitation." *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518 (1926). Justice Brandeis, whose concurring opinion in *Ashwander* v. *TVA*, 297 U. S. 288, 341–356 (1936), is frequently cited as the definitive statement of the rule of "constitutional avoidance," himself cautioned: "The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. . . . Neither may it do so to avoid having to resolve a constitutional doubt." *Crowell* v. *Benson*, *supra*, at 76–77 (dissenting opinion). Adoption of a particular construction to avoid a constitutional ruling, Justice Brandeis stated, was appropriate only "where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional." 285 U. S., at 76.

These limits on our power to avoid constitutional issues through statutory construction flow from the same principle as does the policy of constitutional avoidance itself: that is,

the principle of deference to the legislature's exercise of its assigned role in our constitutional system. See *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 571 (1947). The task of defining the objectives of public policy and weighing the relative merits of alternative means of reaching those objectives belongs to the legislature. The courts should not lightly take it upon themselves to state that the path chosen by Congress is an impermissible one; but neither are the courts free to redraft statutory schemes in ways not anticipated by Congress solely to avoid constitutional difficulties. The latter course may at times be a more drastic imposition on legislative authority than the former. When the choice facing a court is between finding a particular application of a statute unconstitutional and adopting a construction of the statute that avoids the difficulty but at the same time materially deviates from the legislative plan and frustrates permissible applications, the choice of constitutional adjudication may well be preferable.

With these guidelines in mind, I turn to consideration of the proper construction of the statute at hand.

B

The Investment Advisers Act of 1940, 54 Stat. 847, as amended, 15 U. S. C. § 80b–1 *et seq.*, provides that persons doing business as "investment advisers" must (with certain exceptions) register with the SEC. § 80b–3(a). The Act sets forth substantive grounds for the denial or revocation of an investment adviser's registration. § 80b–3(e). It is unlawful for an adviser who has not registered or whose registration has been revoked, suspended, or denied to practice his trade; if he does so, he may be subject to criminal penalties, § 80b–17, or to injunction, § 80b–9(e). In addition to penalizing those who would offer investment advice without registering, the Act contains provisions applicable to all investment advisers, whether registered or not. Most notable among these are prohibitions on certain contracts between

advisers and their clients, see § 80b–5, recordkeeping requirements, see § 80b–4, and provisions that make it unlawful for advisers to engage in "fraudulent, deceptive, or manipulative" conduct, see § 80b–6.

There is no question but that if petitioner's publishing activities bring him within the statutory definition of an "investment adviser," the Act subjects him to injunction (and, presumably, criminal penalties) if he persists in engaging in those activities. Thus, if petitioner is an "investment adviser," the constitutional questions raised by the application of the Act's enforcement provisions to his conduct must be faced.

The starting point, then, must be the definition itself:

> "'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include . . . (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U. S. C. § 80b–2(a)(11).

Although petitioner does not offer his subscribers investment advice specifically tailored to their individual needs and engages in no direct communications with them, he undeniably "engages in the business of advising others . . . through publications . . . as to the value of securities" and "issues or promulgates analyses or reports concerning securities." Thus, he falls outside the definition of an "investment adviser" only if each of his publications qualifies as a "bona fide newspaper, news magazine or business or financial publication of general and regular circulation." The question is whether the "bona fide publications" exception is to be con-

strued so broadly as to exclude from the definition all persons whose advisory activities are carried out solely through publications offering impersonal investment advice to their subscribers.

It is hardly crystal clear from the face of the statute how the primary definition and the "bona fide publications" exception are supposed to mesh, but the SEC has, since the Act's inception, interpreted the statutory definition of "investment adviser" to cover persons whose activities are limited to the publication of investment advisory newsletters or reports such as those published by petitioner. At the conclusion of the Act's first year of operation, the Commission reported that of the approximately 750 persons and firms registering under the Act, "165 firms indicated that their investment advisory service consisted only of the sale of uniform publications." Seventh Annual Report of the Securities and Exchange Commission, Fiscal Year Ended June 30, 1941, p. 35 (1942).[1] Since that time, it appears that the Commission has consistently and routinely applied the Act to the publishers of newsletters offering investment advice. See, *e. g.*, *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963); *In re Todd*, 40 S. E. C. 303 (1960); see also Lovitch, The Investment Advisers Act of 1940—Who Is an "Investment Adviser"?, 24 Kan. L. Rev. 67 (1975).[2] The SEC's

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[1] The Court argues that this fact is without significance, as it proves only that publishers found it to be to their own advantage to register. But the SEC's matter-of-fact announcement of the number of publishers registering under the Act establishes something else: from the beginning, the SEC assumed the Act applied to such publishers.

[2] In 1963, the Commission explained its view of the coverage of the Act as follows:

"The investment advisers who are required to register with the Commission under the Investment Advisers Act are certain firms (or individuals) engaged in the business of advising others for a fee on the value of the securities or the desirability of buying or selling securities. For the most part they fall into one of two groups: Those publishing advisory services and periodic market reports for subscribers, and those offering supervision

longstanding position that publishers of newsletters offering investment advice are investment advisers for purposes of the Act reflects a construction of the "bona fide publications" exception as "applicable only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice." Applicability of Investment Advisers Act to Certain Publications, SEC Release No. IA–563, 42 Fed. Reg. 2953 (1977), codified at 17 CFR § 276 (1984); cf. *SEC* v. *Suter*, 732 F. 2d 1294 (CA7 1984); *SEC* v. *Wall Street Transcript Corp.*, 422 F. 2d 1371 (CA2), cert. denied, 398 U. S. 958 (1970).

An agency's construction of legislation that it is charged with enforcing is entitled to substantial weight, particularly when the construction is contemporaneous with the enactment of the statute. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). In cases where the policy of constitutional avoidance must be considered, however, the administrative construction cannot be decisive. See *United States* v. *Clark*, 445 U. S. 23, 33, n. 10 (1980). We must, therefore, turn to other guides to the meaning of the statute to determine whether a reasonable construction of the statute is available by which petitioner can be excluded from the category of investment advisers and the constitutional issues thereby be avoided.

Any construction that expands the "bona fide publications" exception beyond the bounds set by the SEC, however, poses great difficulties. If the exception is expanded to include more than just publications that are not primarily vehicles for distributing investment advice, it is difficult to imagine any workable definition that does not sweep in all publications that are not personally tailored to individual clients. Indeed, it appears that this is precisely the definition the Court

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of individual clients' portfolios." Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, p. 146 (1963).

adopts.[3] But such an expansive definition of the exception renders superfluous certain key passages in the primary definition of an "investment adviser": one who engages in the business of rendering investment advice "*either directly or*

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[3] The Court suggests that "tipsters" and "touts" might not qualify under its reading of the "bona fide publications" exception either because their publications are not sufficiently regular or because their advice is not sufficiently disinterested. Both suggestions seem implausible. As is evident from the Court's conclusion that petitioner's publications meet the regularity requirement, the Court's construction of the requirement adopts the view of our major law reviews on the issue of regular publication: good intentions are enough. Thus, if a "tout" or "tipster" promised to publish his recommendations at more or less regular intervals, he, like petitioner, would meet the regularity requirement. Moreover, a truly "hit and run" practitioner—one who did not even claim an intention of issuing further recommendations—would not fall within the definition of an "investment adviser" because he would not be deemed to "engag[e] in the business" of advising others. See Applicability of Investment Advisers Act to Certain Publications, SEC Release No. 1A–563, 42 Fed. Reg. 2953 (1977), codified at 17 CFR § 276 (1984). As for the Court's suggestion that "touts" and "tipsters" might not qualify under the exception if their advice was not disinterested, it appears completely unfounded: nowhere in the language or history of the Act is there any suggestion that whether a person is an investment adviser depends on whether his advice is disinterested. In addition, in suggesting that the character of the adviser's advice determines whether he falls within the "bona fide publications" exception, the Court contradicts itself. At one point, it states that the exception is based on "objective" criteria, and it purports to eschew a content-based interpretation of the term "bona fide." See *ante*, at, 207–208, n. 53. At another, the Court suggests that publications that offer advice that is not disinterested are not "bona fide." See *ante*, at 207–209, and n. 55. It is hard to understand why the Court prefers *its* content-based reading to the SEC's, particularly given that the SEC's reading is much simpler to apply in practice: if a publication is primarily a device for offering investment advice, it is not a "bona fide" newspaper, news magazine, or business or financial publication. Under the Court's reading, the SEC would have to force the publisher to disclose his own financial holdings and then compare his recommendations with his stock holdings in order to determine whether his publications were "bona fide." This requirement would be self-defeating, since the SEC has no authority under the Act to order such disclosures by anyone whom it does not already know to be an investment adviser.

through publications or writings" or who "*issues or promulgates analyses or reports concerning securities.*" Had Congress intended the "bona fide publications" exception to encompass *all* publications, it is difficult to imagine why the primary definition of "investment adviser" should have spoken in the disjunctive of those who rendered advice directly and those who rendered it through publications, analyses, or reports. Nor is it clear why Congress would have chosen the adjective "bona fide" had it not intended that the SEC look beyond the form of a publication in determining whether it fell within the exception.[4] The construction of the Act

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[4] The Second Circuit's explication of the use of the term "bona fide" in the statute is instructive:

"Section 202(a)(11) of the Act lists a number of examples of persons or entities whose activities might fall within the broad definition of 'investment adviser' but whose customary practices would not place them in the special, otherwise unregulated, fiduciary role for which the law established standards. . . . The phrase 'bona fide' newspapers, in the context of this list, means those publications which do not deviate from customary newspaper activities to such an extent that there is a likelihood that the wrongdoing which the Act was designed to prevent has occurred. The determination of whether or not a given publication fits within this exclusion must depend upon the nature of its practices rather than upon the purely formal 'indicia of a newspaper' which it exhibits on its face and in the size and nature of its subscription list." *SEC* v. *Wall Street Transcript Corp.*, 422 F. 2d 1371, 1377, cert. denied, 398 U. S. 958 (1970).

The Second Circuit's reasoning provides firm support for the SEC's position that the point of the "bona fide publications" exception is to differentiate publications devoted solely or primarily to the provision of investment advice from publications that contain more diversified or general discussions of news events and business or financial topics. The aim of the Act is the protection of the investing public against fraud or manipulation on the part of advisers. Viewed in light of this purpose, a publication that is no more than a vehicle for investment advice is an obvious target for regulatory measures: it makes sense to treat the entire publication as an adviser and to impose liability on the publication itself in the case of fraud or manipulation. On the other hand, the publisher of a publication that presents diverse forms of information and is not narrowly focused on the provision of investment advice is not so likely to engage in abusive prac-

that would exclude petitioner from the category of investment advisers because he offers his advice through publications thus conflicts with the fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language. *Connecticut Dept. of Income Maintenance* v. *Heckler*, 471 U. S. 524, 530, and n. 15 (1985); *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 339 (1979).

Nothing in the legislative history of the statute supports a construction of "investment adviser" that would exclude persons who offer investment advice only through such publications as newsletters and reports. Although there is very little discussion of the issue, it is significant that in the hearings on the proposed legislation, representatives of both the SEC and the investment advisers expressed their view that the Act would cover the publishers of investment newsletters. David Schenker, the Chief Counsel of the SEC Investment Trust Study and one of the primary architects of the proposed legislation, explained that the term "investment advisers" as used in the Act "encompasses that broad category ranging from people who are engaged in the profession of furnishing disinterested, impartial advice to a certain economic stratum of our population to the other extreme, individuals engaged in running tipster organizations, or sending through the mails stock market letters." Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., 47 (1940) (hereafter Senate Hearings). In the later House hearings, James White, a representative of a Boston investment counsel firm

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tices. Thus, it is logical to treat the publication itself as a "bona fide publication" and to exempt its publisher from classification as an investment adviser. Individual writers who make it their business to offer investment advice to the publication's readers on a regular basis, however, may still be covered. See Lovitch, The Investment Advisers Act of 1940—Who Is an "Investment Adviser"?, 24 Kan. L. Rev. 67, 94, n. 222 (1975) (noting SEC staff's position that columnists who offer investment advice in exempt publications are investment advisers).

who was among the industry spokesmen who cooperated with the SEC in the later stages of the drafting of the bill, expressed the same view of the scope of the statutory definition in its final form: "the term includes people who send out bulletins from time to time on the advisability of buying or selling stocks, or even giving tips on cheap stocks, and goes all of the way from that to individuals and firms who undertake to give constant supervision to the entire investments of their clients on a personal basis and who even advise them on tax matters and other financial matters which essentially are not a question of choice of investments."[5] Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 87 (1940). Later in his testimony, White specifically explained to Representative Boren that persons whose advice was furnished solely through publications were *not* excepted from the class of investment advisers as defined in the Act.

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[5] The Court correctly points out that Mr. Schenker's statement was made before the "bona fide publications" exception was in its final form and before the inclusion in the record of the Subcommittee hearings of the Illinois report that suggested that regulation of publishers might raise First Amendment problems. The Court neglects to acknowledge that Mr. White's statement postdated both the submission of the report to the Senate Subcommittee and the amendment of the Act's definition to its final form. White's statement is a plain indication that the drafters of the bill had not changed their position since the inception of the Senate hearings: publishers were still viewed to be within the Act.

The Court also suggests that its interpretation of the scope of the exception is consistent with White's statement that persons who "send out bulletins from time to time" offering investment advice are investment advisers. Such persons, the Court suggests, would not meet the "regularity" requirement of the "bona fide publications" exception. But the Court's own loose construction of the requirement belies this argument: petitioner himself, at best, can be described as a person who sends out bulletins "from time to time." If the timeliness of petitioner's publications is sufficient to meet the Act's regularity requirement, it is hard to imagine a publisher who could not qualify.

See *id.*, at 90–91.[6] And although the House and Senate Reports are in the main silent on the question of the extent to which advisers operating solely through publications are governed by the Act, the Senate Report does at least make clear that a personal relationship between adviser and client is not a *sine qua non* of an investment adviser under the statute: the Report states that the Act "recognizes that with respect to *a certain class of* investment advisers, a type of personalized relationship *may* exist with their clients." S. Rep. No. 1775, 76th Cong., 3d Sess., 22 (1940) (emphasis added).[7]

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[6] The Court argues that my interpretation of the exchange between Boren and White is incorrect. I am at a loss to understand this contention. To my mind, the colloquy, as reprinted by the Court, unambiguously supports my reading. Representative Boren asked Mr. White why persons who dispensed investment advice through publications should be excluded from the category of investment advisers. White answered the question by pointing out that its premise was incorrect: Boren was reading the wrong definition. The clear implication was that the correct definition did include such publishers, and Boren's last remark—"that clarifies it for me"—indicates that he took the point.

[7] In reaching the opposite conclusion, the Court relies on a hodgepodge of materials that are either completely irrelevant or reflect approaches that were explicitly rejected by the framers of the statute. For example, the Court correctly notes that the SEC Report that was in large measure the impetus for the Investment Advisers Act restricted its attention to "investment counsel"—that is, investment advisers maintaining a personal relationship with individual clients. See Investment Trusts and Investment Companies, Report of the Securities and Exchange Commission, Pursuant to Section 30 of the Public Utility Holding Company Act of 1935, Investment Counsel, Investment Management, Investment Supervisory, and Investment Advisory Services, H. R. Doc. No. 477, 76th Cong., 2d Sess. (1939). But imputing the narrow focus of the Report to the Act itself would be a serious mistake, for the Act explicitly covers investment advisers who cannot be described as "investment counsel." This is evident from § 208(c) of the Act, which provides that no investment adviser may hold himself out as "investment counsel" unless "a substantial part of his . . . business consists of rendering investment supervisory services"—"investment supervisory services" being defined by § 202(a)(13) of the Act as "the giving of continuous advice as to the investment of funds

The subsequent legislative history of the Act testifies to Congress' continuing belief that the legislation it has enacted applies to publishers of investment advice as well as to per-

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on the basis of the individual needs of each client." The Act could not be clearer: not all "investment advisers" under the Act are "investment counsel." The Act's careful distinction between "investment counsel" and the other investment advisers subject to its provisions leaves no doubt that the framers of the Act intended it to cover advisers *not* engaged in personal investment counseling as well as "investment counsel." For this reason, it can by no means be said that the SEC Report's focus on "investment counsel" limits the scope of the Act.

The Court's reliance on the self-serving statements of industry representatives regarding the importance of their personal relationships with their clients is similarly misplaced. First, it is abundantly clear that the investment counsel who testified before the Senate Subcommittee were *not* suggesting that only advisers with personal relationships with their clients should be covered by the Act—far from it. Rather, the import of their statements was that reputable "investment counsel" who had a personal fiduciary relationship with their clients did not require federal regulation (unlike the "touts and tipsters" whom these investment counselors unanimously reviled).

Second, it appears that the primary problem these "investment counsel" had with the Act was their fear that it would require them to disclose confidential communications with their clients. This concern was dealt with through the insertion into the Act of § 210(c), which provides that "[n]o provision of this subchapter shall be construed to require, or to authorize the Commission to require any investment adviser engaged in rendering investment supervisory services to disclose the identity, investments, or affairs of any client of such investment adviser, except insofar as such disclosure may be necessary or appropriate in a particular proceeding or investigation having as its object the enforcement of a provision or provisions of this subchapter." 15 U. S. C. § 80b–10(c). The references in the House and Senate Reports to the "care [that] has been taken . . . to respect this relationship between investment advisers and their clients," see *ante*, at 201, obviously refer to this provision for confidentiality and to the provision restricting the class of investment advisers who may claim the title "investment counsel." The Reports' references to adviser-client relationships thus by no means suggest that the Act limited its definition of "investment advisers" to those who offered personalized services. Indeed, § 210(c) of the Act, in referring to "investment advisers engaged in rendering investment supervisory services"—that is, "the giving of con-

sons who offer personal investment counseling. In 1960, Congress substantially expanded the penalties available to the Commission for use against unregistered advisers and advisers engaged in fraudulent or manipulative activities. Pub. L. 86–750, 74 Stat. 885. In describing the scope of the legislation, the Senate Report explained that "[t]hose defined as investment advisers by the act range from investment counsel firms, brokers whose advice is not incidental to their business, *financial publishing houses not of general circulation, tout sheets* and others." S. Rep. No. 1760, 86th Cong., 2d Sess., 2 (1960) (emphasis added). In 1970, Con-

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tinuous advice as to the investment of funds on the basis of the individual needs of each client"—makes quite clear that some persons defined as "investment advisers" under the Act do *not* offer such personalized services.

The Court also errs in relying on the Illinois report reprinted in the Senate Hearings as authority for the notion that Congress intended to exclude all publishers from the definition of "investment adviser" in order to avoid constitutional difficulties. See *ante*, at 197–199. This report cannot bear the weight the Court places on it. The discussion in the report—buried in a document placed into the record after weeks of hearings—contains the only mention in the legislative history of the Act of the potential First Amendment difficulties raised by including publications within the category of investment advisers. Still more significant is the definite rejection of the report's recommended solution to the First Amendment problem by the drafters of the Act. The report's recommendation was that any legislation regulating "investment counselors" should "carefully defin[e] the term 'investment counselor' so as to exclude 'any person or organization which engages in the business of furnishing investment analysis, opinion, or advice solely through publications distributed to a list of subscribers and not furnishing specific advice to any client with respect to securities, and also persons or organizations furnishing only economic advice and not advice relating to the purchase or sale of securities.'" Senate Hearings, at 1009. This approach, the report noted, was "generally the same as that used by the [SEC] in limiting the scope of its report on investment counsel organizations." *Ibid.* The Act, of course, did *not* carefully exclude persons who furnished advice through publications—it expressly *included* them in its definition. Moreover, the Act's provisions make it quite clear that the definition of "investment adviser" in § 202(a)(11) is more expansive than the definition of "investment counsel" used in the SEC study and in § 208(c) of the Act itself.

gress again expanded the enforcement authority of the SEC, see Pub. L. 91–547, 84 Stat. 1430; and again, the Senate Report explained that the Act "regulates the activities of those who receive compensation for advising others with respect to investments in securities *or who are in the business of issuing analyses or reports concerning securities.*" S. Rep. No. 91–184, p. 43 (1969) (emphasis added).

A construction of the Act that excludes publishers of investment advisory newsletters from the definition of "investment adviser" not only runs counter to the statute's language, legislative history, and administrative construction, but also frustrates the policy of the Act by preventing apparently legitimate applications of the statute. The SEC has long been concerned with the problem of fraudulent and manipulative practices by some investment advisory publishers—specifically, with the problem of "scalping," whereby a person associated with an advisory service "purchas[es] shares of a security for his own account shortly before recommending that security for long-term investment and then immediately sell[s] the shares at a profit upon the rise in the market price following the recommendation." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 181 (1963). An SEC study issued in 1963 emphasized that this practice is most dangerous when engaged in by an "advisory service with a sizable circulation"—that is, a newsletter or other publication—whose recommendation "could have at least a short-term effect on a stock's market price." Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, p. 372 (1963). The SEC study concluded that scalping was a serious problem within the investment advisory industry. See *id.*, at 371–373.

In *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, we held that the antifraud provisions of the Investment Advisers Act could be invoked against the publisher of an investment advisory newsletter who had engaged in scalping, and that such

an adviser could be required "to make full and frank disclosure of his practice of trading on the effect of his recommendations." *Id.*, at 197. The Court's construction of the Act, under which a publisher like petitioner is not an "investment adviser" and is therefore not subject to the Act's antifraud provisions, effectively overrules *Capital Gains* and limits the SEC's power to protect the public against a potentially serious form of fraud and manipulation. But there is no suggestion that the application of the antifraud provisions of the Act to require investment advisory publishers to disclose material facts would present serious First Amendment difficulties. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626, 651 (1985); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 637–638 (1980); *Schneider* v. *State*, 308 U. S. 147, 164 (1939).[8] Accordingly, the Court's zeal to avoid the narrow constitutional issue presented by the case leads it to adopt a construction of the Act that, wholly unnecessarily, prevents what would seem to be desirable and constitutional applications of the Act—a result at odds with our longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly in order to effectuate their remedial purposes. See, *e. g.*, *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967).[9]

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[8] Similarly, the application of the Act's reporting requirements, 15 U. S. C. § 80b–4, to investment advisers whose activities are restricted to publishing would not appear to raise serious First Amendment concerns. The reporting requirements would not inhibit such advisers from speaking, and it is well settled that "[t]he Amendment does not forbid . . . regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 193 (1946). See also *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), in which we held that the press is not exempt from the generally applicable requirement that a citizen produce evidence in response to a subpoena.

[9] The Court brushes aside the significance of this consequence by suggesting that alternative remedies—specifically, remedies under Rule 10b–5—may be available. This may be so, although the requirement of Rule

It is ironic that this construction, at odds with the language, history, and policies of the Act, is adopted in the name of constitutional avoidance. One does not have to read the Court's opinion very closely to realize that its interpretation of the Act is in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of newsletters by unregistered advisers. Indeed, the Court tips its hand when it discusses the Court's decisions in *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938), and *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). The Court reasons that given these decisions, which forbade certain forms of prior restraints on speech, the 76th Congress could not have intended to enact a licensing provision for investment advisers that would include persons whose advisory activities were limited to publishing. The implication is that the application of the Act's penalties to unregistered publishers would violate the principles of *Lovell* and *Near;* and because Con-

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10b–5 that any nondisclosure violate an existing fiduciary duty, see *Chiarella* v. *United States*, 445 U. S. 222 (1980), leaves the matter in some doubt. The District Court in *SEC* v. *Blavin*, 557 F. Supp. 1304 (ED Mich. SD 1983), aff'd, 760 F. 2d 706 (CA6 1985), had little difficulty in finding a fiduciary duty, for it held that the defendant's publishing activities brought him squarely within the Act's definition of an "investment adviser," and that "as [an investment adviser, he] had a duty to his clients and readers to undertake some reasonable investigation of the figures he was printing before he printed them." 557 F. Supp., at 1314. The Court, of course, holds that publishers like petitioner (and Blavin) are not investment advisers and thus excludes the possibility that the Investment Advisers Act could supply the requisite fiduciary duty. The Court also hypothesizes that scalping by a publisher might constitute mail fraud, but again, as far as I am aware, that is no more than an open question. The certainty that the Investment Advisers Act provides a remedy against scalping thus remains, for me, a persuasive reason for not adopting a construction of the Act that would exclude petitioner. In addition, the antifraud provisions of the Act are supplemented by reporting requirements that may be used to aid the SEC in uncovering scalping. By taking petitioner outside the category of investment advisers, the Court places him beyond the reach of these additional tools for uncovering deceit.

gress is assumed to know the law, see *ante*, at 205, n. 50, the Court concludes that it must not have intended that result.

This reasoning begs the question. What we have been called on to decide in this case is precisely whether restraints on petitioner's publication *are* unconstitutional in light of such decisions as *Near* and *Lovell*. While purporting not to decide the question, the Court bases its statutory holding in large measure on the assumption that Congress already knew the answer to it when the statute was enacted. The Court thus attributes to the 76th Congress a clairvoyance the Solicitor General and the Second Circuit apparently lack—that is, the ability to predict our constitutional holdings 45 years in advance of our declining to reach them. If the policy of constitutional avoidance amounts to no more than a preference for implicitly deciding constitutional questions without explaining our reasoning, and if the consequence of adopting the policy is a statutory decision more disruptive of the legislative framework than a decision on the narrow constitutional issue presented, the purposes underlying the policy have been ill-served. In light of the language, history, and purposes of the statute, I would read its definition of "investment adviser" to encompass publishers like petitioner, and turn to the constitutional question. In the words of Justice Cardozo:

> "[A]voidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered." *George Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 379 (1933).

II

Petitioner, an investment adviser whose registration has been revoked, seeks to continue the practice of his profession by publishing newsletters containing investment advice.

The SEC, consistent with the terms of the Act as I read them, has attempted to enjoin petitioner from engaging in these activities. The question is whether the First Amendment permits the Federal Government so to prohibit petitioner's publication of investment advice.

A

This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment. The Court determined long ago that although "[i]t is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, . . . there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed . . . for the protection of society." *Dent* v. *West Virginia*, 129 U. S. 114, 121–122 (1889). Regulations on entry into a profession, as a general matter, are constitutional if they "have a rational connection with the applicant's fitness or capacity to practice" the profession. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 (1957).

The power of government to regulate the professions is not lost whenever the practice of a profession entails speech. The underlying principle was expressed by the Court in *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949): "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

Perhaps the most obvious example of a "speaking profession" that is subject to governmental licensing is the legal profession. Although a lawyer's work is almost entirely devoted to the sort of communicative acts that, viewed in isolation, fall within the First Amendment's protection, we

have never doubted that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . ." *Schware* v. *Board of Bar Examiners*, *supra*, at 239. The rationale for such limits was expressed by Justice Frankfurter:

> "One does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to 'life, liberty and property' are in the professional keeping of lawyers. It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' to quote Devlin, J., in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.'" 353 U. S., at 247 (concurring opinion).

The Government's position is that these same principles support the legitimacy of its regulation of the investment advisory profession, whether conducted through publications or through personal client-adviser relationships. Clients trust in investment advisers, if not for the protection of life and liberty, at least for the safekeeping and accumulation of property. Bad investment advice may be a cover for stock-market manipulations designed to bilk the client for the benefit of the adviser; worse, it may lead to ruinous losses for the client. To protect investors, the Government insists, it may require that investment advisers, like lawyers, evince the qualities of truth-speaking, honor, discretion, and fiduciary responsibility.

But the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech

per se or of the press. See *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Schneider* v. *State*, 308 U. S. 147 (1939); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); *Jamison* v. *Texas*, 318 U. S. 413 (1943). At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment.

The Government submits that the location of the point at which professional regulation (with incidental effects on otherwise protected expression) becomes regulation of speech or the press is a matter that should be left to the legislature. In this case, the Government argues, Congress has determined that investment advisers—including publishers such as petitioner—are fiduciaries for their clients. Accordingly, Congress has the power to limit entry into the profession in order to ensure that only those who are suitable to fulfill their fiduciary responsibilities may engage in the profession.

I cannot accept this as a sufficient answer to petitioner's constitutional objection. The question whether any given legislation restrains speech or is merely a permissible regulation of a profession is one that we ourselves must answer if we are to perform our proper function of reviewing legislation to ensure its conformity with the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803). Although congressional enactments come to this Court with a presumption in favor of their validity, see *Rostker* v. *Goldberg*, 453 U. S. 57, 64 (1981), Congress' characterization of its legislation cannot be decisive of the question of its constitutionality where individual rights are at issue. See *Trop* v. *Dulles*, 356 U. S. 86, 94–104 (1958) (plurality opinion of Warren, C. J.); cf. *Buckley* v. *Valeo*,

424 U. S. 1, 14–24 (1976) *(per curiam)*. Surely it cannot be said, for example, that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which "unqualified" writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment. It is for us, then, to find some principle by which to answer the question whether the Investment Advisers Act as applied to petitioner operates as a regulation of speech or of professional conduct.

This is a problem Justice Jackson wrestled with in his concurring opinion in *Thomas* v. *Collins*, 323 U. S., at 544–548. His words are instructive:

> "[A] rough distinction always exists, I think, which is more shortly illustrated than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union." *Id.*, at 544–545.

Justice Jackson concluded that the distinguishing factor was whether the speech in any particular case was "associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within official control." *Id.*, at 547.

If "in a particular case the association or characterization is a proven and valid one," he concluded, the regulation may stand. *Ibid.*

These ideas help to locate the point where regulation of a profession leaves off and prohibitions on speech begin. One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.[10] Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[11]

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[10] Of course, it is possible that conditions the government might impose on entry into a profession would in some cases themselves violate the First Amendment. For example, denial of a license on the basis of the applicant's beliefs or political statements he had made in the past could constitute a First Amendment violation. However, in such a case, the problem would not be that it was impermissible for the government to restrict entry into the profession because of the nature of the profession itself.

[11] See *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 720 (1931) ("Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint").

As applied to limit entry into the profession of providing investment advice tailored to the individual needs of each client, then, the Investment Advisers Act is not subject to scrutiny as a regulation of speech—it can be justified as a legitimate exercise of the power to license those who would practice a profession, and it is no more subject to constitutional attack than state-imposed limits on those who may practice the professions of law and medicine. The application of the Act's enforcement provisions to prevent unregistered persons from engaging in the business of publishing investment advice for the benefit of any who would purchase their publications, however, is a direct restraint on freedom of speech and of the press subject to the searching scrutiny called for by the First Amendment.

B

The recognition that the prohibition on the publishing of investment advice by persons not registered under the Act is a restraint on speech does not end the inquiry. Not all restrictions on speech are impermissible. The Government contends that even if the statutory restraints on petitioner's publishing activities are deemed to be restraints on speech rather than mere regulations of entry into a profession, petitioner's speech is "expression related solely to the economic interests of the speaker and its audience," *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 561 (1980), and is therefore subject to the reduced protection afforded what we have come to describe as "commercial speech." See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985). Under the commercial speech doctrine, restrictions on commercial speech that directly advance a substantial governmental interest may be upheld. See *id.*, at 638. The prohibition on petitioner's publishing activities, the Government suggests, is such a permissible restriction, as it directly advances the goal of protecting the investing public against unscrupulous advisers.

Petitioner, echoing the dissent below, argues that the expression contained in his newsletters is not commercial speech, as it does not propose a commercial transaction between the speaker and his audience. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976). Although petitioner concedes that his speech relates to economic subjects, he argues that it is not for that reason stripped of its status as fully protected speech. See *Thomas* v. *Collins*, 323 U. S., at 531. Accordingly, he argues, the prohibition on his speech can be upheld "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530, 541 (1980).

I do not believe it is necessary to the resolution of this case to determine whether petitioner's newsletters contain fully protected speech or commercial speech. The Act purports to make it unlawful for petitioner to publish newsletters containing investment advice and to authorize an injunction against such publication. The ban extends as well to legitimate, disinterested advice as to advice that is fraudulent, deceptive, or manipulative. Such a flat prohibition or prior restraint on speech is, as applied to fully protected speech, presumptively invalid and may be sustained only under the most extraordinary circumstances. See *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Schneider* v. *State*, 308 U. S. 147 (1939); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). I do not understand the Government to argue that the circumstances that would justify a restraint on fully protected speech are remotely present in this case.

But even where mere "commercial speech" is concerned, the First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest. The interest here is certainly legitimate: the Government wants to prevent investors from falling into the hands of scoundrels and swindlers. The means

chosen, however, is extreme. Based on petitioner's past misconduct, the Government fears that he may in the future publish advice that is fraudulent or misleading; and it therefore seeks to prevent him from publishing *any* advice, regardless of whether it is actually objectionable. Our commercial speech cases have consistently rejected the proposition that such drastic prohibitions on speech may be justified by a mere possibility that the prohibited speech will be fraudulent. See *Zauderer, supra; In re R. M. J.*, 455 U. S. 191, 203 (1982); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977). So also here. It cannot be plausibly maintained that investment advice from a person whose background indicates that he is unreliable is *inherently* misleading or deceptive,[12] nor am I convinced that less drastic remedies than outright suppression (for example, application of the Act's antifraud provisions) are not available to achieve the Government's asserted purpose of protecting investors. Accordingly, I would hold that the Act, as applied to prevent petitioner from publishing investment advice altogether, is too blunt an instrument to survive even the reduced level of scrutiny called for by restrictions on commercial speech. The Court's observation in *Schneider* v. *State, supra*, at 164, is applicable here as well:

> "Frauds may be denounced as offenses and punished by law. . . . If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated . . . and who may impart the information, the answer is that considerations of this sort do not empower [government] to abridge freedom of speech and press."

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[12] Cf. *Near* v. *Minnesota ex rel. Olson, supra*, in which the Court held that previous publication of defamatory material—unprotected speech—could not justify a prior restraint limited to further publication of defamatory matter. Here, the ban on petitioner's future publishing activities extends to nondeceptive (that is, protected) as well as fraudulent speech.

III

I emphasize the narrowness of the constitutional basis on which I would decide this case. I see no infirmity in defining the term "investment adviser" to include a publisher like petitioner, and I would by no means foreclose the application of, for example, the Act's antifraud or reporting provisions to investment advisers (registered or unregistered) who offer their advice through publications. Nor do I intend to suggest that it is unconstitutional to invoke the Act's provisions for injunctive relief and criminal penalties against unregistered persons who, for compensation, offer personal investment advice to individual clients. I would hold only that the Act may not constitutionally be applied to prevent persons who are unregistered (including persons whose registration has been denied or revoked) from offering impersonal investment advice through publications such as the newsletters published by petitioner.

Although this constitutional holding, unlike the Court's statutory holding, would not foreclose the SEC from treating petitioner as an "investment adviser" for some purposes, it would require reversal of the judgment of the Court of Appeals. I therefore concur in the result.

Syllabus

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. *v.* PUEBLO OF SANTA ANA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–262. Argued February 20, 1985—Decided June 10, 1985

The Pueblo Lands Act of 1924 was enacted to adjudicate and settle conflicting titles affecting lands claimed by respondent Pueblo Indian Tribe. Section 17 of the Act provides: "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." In 1928, while an action by the United States, as guardian for respondent, to quiet title to respondent's lands was pending in Federal District Court, the Secretary of the Interior (Secretary) approved an agreement between petitioner and respondent granting petitioner an easement for a telephone line on land owned by respondent. As a result, the District Court dismissed petitioner (whose predecessor had allegedly acquired a right-of-way) from the quiet title action on the ground that it had acquired a valid title to the easement. After petitioner removed the telephone line in 1980, respondent brought an action in Federal District Court, claiming trespass damages for the period prior to the removal of the line on the asserted ground that the 1928 conveyance was not authorized by § 17 because Congress had not enacted legislation approving it. The District Court granted partial summary judgment for respondent on the issue of liability, holding that the 1928 conveyance was not authorized by § 17. The Court of Appeals affirmed, holding that respondent's lands were protected by the Nonintercourse Act, which prohibits any purchase, grant, lease, or other conveyance of lands from any Indian tribe, and that § 17 did not authorize any conveyance of such lands. The court reasoned that, since the two clauses of § 17 are joined by the conjunctive "and," two things were required to make a conveyance of respondent's lands valid—first, the lands must be conveyed in a manner provided

by Congress and, second, the Secretary must approve—and that since Congress had provided nothing with respect to the 1928 agreement, the first requirement was not met and hence the Secretary's approval was meaningless.

Held: The conveyance of the easement was valid under § 17 of the Pueblo Lands Act. Pp. 249–255.

(a) While the word "hereafter" in the first clause of § 17 supports the Court of Appeals' interpretation of the Act, such interpretation renders the requirement of the Secretary's approval a nullity until Congress acts. In light of the canon of statutory construction that a statute should be interpreted so as not to render one part inoperative, the second clause of § 17 cannot be read as limiting Congress' power to legislate in the "hereafter." The Court of Appeals' interpretation of § 17 would also nullify the effect of § 16 of the Act, which authorizes the Secretary, with respondent's consent, to sell any of respondent's lands that are located among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian lands as part of the claim settlement program established by the Act. Moreover, the practical effect of the Court of Appeals' interpretation is to apply the requirement of the Nonintercourse Act to voluntary transfers of respondent's lands. A review of the structure of the Pueblo Lands Act leads to the conclusion that Congress when it enacted that Act, rather than leaving the matter of voluntary transfers to be decided by the courts or applying the rule of the Nonintercourse Act, adopted a new rule of law in view of the unique history of respondent's lands. Pp. 249–251.

(b) To harmonize § 17's two clauses with the Act's entire structure and with "its contemporary legal context," the first clause should be read as a flat prohibition against reliance on New Mexico law in connection with future transactions involving respondent's lands, and to make voluntary or involuntary alienation of those lands after 1924 occur only if sanctioned by federal law. And the second clause should be interpreted as providing a firm command, as a matter of federal law, that no future conveyance should be valid without the Secretary's approval. This interpretation of § 17 gives both clauses a meaning that is consistent with the remainder of the Act, with respondent's historical situation, and with the legislative history, and is supported by the Secretary's contemporaneous opinion and by the District Judge who gave his stamp of approval to the transaction originally and other similar ones after enactment of the Pueblo Lands Act. Pp. 252–255.

734 F. 2d 1402, reversed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 255. POWELL, J., took no part in the decision of the case.

Kathryn Marie Krause argued the cause for petitioner. With her on the briefs were *William H. Allen* and *Russell H. Carpenter, Jr.*

Scott E. Borg argued the cause for respondent. With him on the brief was *Richard W. Hughes.**

JUSTICE STEVENS delivered the opinion of the Court.

In 1928, Mountain States Telephone and Telegraph Company purchased an easement from the Pueblo of Santa Ana for a telephone line. Mountain States contends that the conveyance of this easement was valid under § 17 of the Pueblo Lands Act of 1924, 43 Stat. 641, because it was "first approved by the Secretary of the Interior."[1] The Pueblo contends that § 17 only authorizes such transfers "as may hereafter be provided by Congress," and that Congress never provided legislation authorizing the conveyance of Pueblo lands with the approval of the Secretary. Both constructions find some support in the language of § 17.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, F. Henry Habicht II, Deputy Solicitor General Claiborne, Edwin S. Kneedler,* and *Robert L. Klarquist;* for the State of New Mexico by *Paul Bardacke,* Attorney General, *Charlotte Uram* and *Bruce Thompson,* Assistant Attorneys General, and *Hugh W. Parry,* Special Assistant Attorney General; for the City of Escondido et al. by *John R. Schell, Kent H. Foster, Paul D. Engstrand,* and *Donald R. Lincoln;* for Atchison, Topeka and Santa Fe Railway Co. by *Gus Svolos, John R. Cooney, Lynn H. Slade,* and *John S. Thal;* and for Public Service Company of New Mexico by *Robert H. Clark.*

Briefs of *amici curiae* urging affirmance were filed for the All Indian Pueblo Council et al. by *L. Lamar Parrish* and *Catherine Baker Stetson;* for the Pueblo de Acoma by *Peter C. Chestnut;* and for the Pueblo of Taos by *William C. Schaab.*

[1] 43 Stat. 641. See *infra*, at 246, for the complete text of § 17.

I

Congress enacted the 1924 legislation "to provide for the final adjudication and settlement of a very complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico."[2] The Committee Reports review the unique and "interesting history of the Pueblo Indians"[3] and explain why special remedial legislation was necessary.

"These Indians were found by Coronado and the first Spanish explorers in 1541, many of them residing in villages and occupying the same lands that the Pueblo Indians now occupy."[4] From the earliest days, the Spanish conquerors recognized the Pueblos' rights in the lands that they still occupy,[5] and their ownership of these lands was confirmed in land grants from the King of Spain. Later, the independent Government of Mexico extended limited civil and political rights to the Pueblo Indians, and confirmed them in the ownership of their lands.

The United States acquired the territory that is now New Mexico in 1848 under the Treaty of Guadalupe-Hidalgo.[6] During the period between 1848 and 1910, when New Mexico became a State, inhabitants of that territory—and members of the bar who advised them—generally believed that the Pueblo Indians had the same unrestricted power to dispose of their lands as non-Indians whose title had originated in Spanish grants. This view was supported by decisions of the

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[2] S. Rep. No. 492, 68th Cong., 1st Sess., 3 (1924).

[3] *Ibid.* The House Report incorporates the Senate Report in verbatim text. H. R. Rep. No. 787, 68th Cong., 1st Sess. (1924).

[4] S. Rep. No. 492, at 3.

[5] The 1924 Act affected "20 Pueblos . . . with a total Indian population of between 6,500 and 8,000. Each Pueblo consists of about 17,000 acres of land within its exterior boundaries, or a total of 340,000 acres in all." *Ibid.*

[6] Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922.

Supreme Court of the Territory of New Mexico,[7] and by this Court's square holding in *United States* v. *Joseph*, 94 U. S. 614 (1877),[8] that the Pueblo Indians were not an "Indian tribe" protected by the Nonintercourse Act.[9] As a result, it

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[7] *United States* v. *Lucero*, 1 N. M. 422 (1869); *Pueblo of Nambe* v. *Romero*, 10 N. M. 58, 61 P. 122 (1900); cf. *United States* v. *Mares*, 14 N. M. 1, 88 P. 1128 (1907).

[8] In concluding that the Pueblos were excluded from the coverage of the Nonintercourse Act, the Court primarily relied upon its understanding of Pueblo culture:

"'For centuries . . . the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. . . . [T]hey are a peaceable, industrious, intelligent, honest, and virtuous people. They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof. . . .'

". . . When it became necessary to extend the laws regulating intercourse with the Indians over our new acquisitions from Mexico, there was ample room for the exercise of those laws among the nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required both for themselves and for the citizens of the country this guardian care of the general government.

"The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class. The degree of civilization which they had attained centuries before, their willing submission to the laws of the Mexican government . . . and their absorption into the general mass of the population . . . all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made . . . ." *United States* v. *Joseph*, 94 U. S., at 616–617 (quoting *United States* v. *Lucero*, 1 N. M., at 453).

[9] The current version of the Nonintercourse Act was enacted as § 12 of the Trade and Intercourse Act of 1834:

"[N]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 4 Stat. 730, 25 U. S. C. § 177.

Section 12 of the 1834 Act is the last in a series of enactments beginning with § 4 of the Indian Trade and Nonintercourse Act of 1790. 1 Stat. 138. See *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 231–232 (1985). In 1851, Congress extended the provisions of

was thought that the Pueblo Indians could convey good title to their lands notwithstanding the Act's prohibition of any "purchase, grant, lease, or other conveyance of lands . . . from any . . . tribe of Indians." 4 Stat. 730, 25 U. S. C. § 177.

The prevailing opinion concerning the unique status of the Pueblo Indians was drawn into question as a result of the attempt by federal authorities to regulate the liquor trade with the Pueblos. They orginally brought charges under an 1897 criminal statute prohibiting the sale of liquor to any "Indian."[10] Relying on *Joseph*, however, the Territorial Supreme Court held, in 1907, that the Pueblos were not "Indians" within the meaning of the statute.[11] In response, the New Mexico Enabling Act of 1910 expressly required that the new State's Constitution prohibit "the introduction of liquors into Indian country, which term shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico."[12] In *United States* v. *Sandoval*, 231 U. S. 28 (1913), the Court noted that whatever doubts there previously were about the applicability of the Indian liquor statute to the Pueblos, "Congress, evidently wishing to make sure of a different result in the future, expressly declared" in the Enabling Act that "it should include them." 231 U. S., at 38.

The narrow question decided in the *Sandoval* case was that the dependent status of the Pueblo Indians was such that Congress could expressly prohibit the introduction of intoxicating liquors into their lands under its power "To regulate Commerce . . . with the Indian Tribes." U. S. Const., Art. I, § 8, cl. 3. In reaching that decision, however, the Court

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"the laws now in force regulating trade and intercourse with the Indian tribes" to "the Indian tribes in the Territor[y] of New Mexico." 9 Stat. 587.

[10] 29 Stat. 506.

[11] *United States* v. *Mares*, 14 N. M., at 4, 88 P., at 1129.

[12] 36 Stat. 558.

rejected the factual premises that had supported its judgment in *Joseph*,[13] and suggested that "the observations there made respecting the Pueblos were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available, and with the long-continued action of the legislative and executive departments." 231 U. S., at 49. The Court's disapproval of *Joseph* strongly implied that the restraints on alienation contained in the Nonintercourse Act—as well as the liquor statute—might apply to the Pueblos. As a result, the validity of all non-Indian claims to Pueblo lands was placed in serious doubt.

Relying on the rule established in *Joseph*, 3,000 non-Indians had acquired putative ownership of parcels of real estate located inside the boundaries of the Pueblo land grants.[14] The Court's decision in *Sandoval* cast a pall over all these titles by suggesting that the Pueblos had been wrongfully dispossessed of their lands, and that they might have the power to eject the non-Indian settlers.[15] After

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[13] "[B]y an uniform course of action beginning as early as 1854 and continued up to the present time, the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling." 231 U. S., at 47.

[14] "These hearings disclosed that there are now approximately 3,000 claimants to lands within the exterior boundaries of the Pueblo grants. The non-Indian claimants with their families comprise about 12,000 persons. With few exceptions, the non-Indian claims range from a town lot of 25 feet front to a few acres in extent. It was stated, however, in the hearings by all parties that probably 80 percent of the claims are not resisted by the Indians and only about 20 percent of the number will be contested." S. Rep. No. 492, at 5.

[15] "The fact that the United States may . . . at any time in the future take steps to oust persons in possession of lands within these Pueblo grants, and the continuing uncertainty as to title, has cast a cloud on all lands held by

conducting extensive hearings on the problem,[16] Congress drafted and enacted the Pueblo Lands Act of 1924. The stated purpose of the Act was to "settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled." S. Rep. No. 492, 68th Cong., 1st Sess., 5 (1924).

II

Under the Act, a Public Lands Board, composed of the Secretary of the Interior, the Attorney General, and a third person to be appointed by the President of the United States, was established to determine conflicting claims to the Pueblo lands. § 2, 43 Stat. 636. The Board was instructed to issue a report setting forth the metes and bounds of the lands of each Pueblo that were found not to be extinguished under the rules established in the Act. *Ibid.* Continuous, open, and notorious adverse possession by non-Indian claimants, coupled with the payment of taxes from 1889 to the date of enactment in 1924, or from 1902 to 1924 if possession was under color of title, sufficed to extinguish a Pueblo's title. § 4.[17]

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white people within the Pueblo areas. . . . The mortgage value of the lands is almost nothing; [and] sales, leases, and transfers have been discontinued . . . ." Hearings on S. 3865 and S. 4223 before the Subcommittee Considering Bills Relative to the Pueblo Indian Lands of the Senate Committee on Public Lands and Surveys, 67th Cong., 4th Sess., 51 (1923) (Senate Hearings) (report submitted with the testimony of R. E. Twitchell, Special Assistant to the Attorney General).

[16] *Ibid.*; Hearings on H. R. 13452 and H. R. 13674 before the House Committee on Indian Affairs, 67th Cong., 4th Sess. (1923).

[17] The Act itself did not purport to resolve the question whether the Nonintercourse Act applied to the Pueblos; § 4 provided that the statutes of limitations in that section were "in addition to any other legal or equitable defenses which [the claimants] may have or have had under the laws of the Territory and State of New Mexico." 43 Stat. 637. In November 1924 the Government docketed an appeal in this Court arguing that the Pueblos had always been wards of the United States, and that adverse judgments entered in 1910 and 1916 in quiet title actions brought by the Pueblo of Laguna could not bar a later quiet title action brought by the United States

The Board's reports were to be implemented by suits to quiet title in the United States District Court for the District of New Mexico. §§ 1, 3.

The Act also directed the Board to award the Pueblos compensation for the value of any rights that were extinguished if they "could have been at any time recovered for said Indians by the United States by seasonable prosecution." § 6. Settlers who had occupied their lands in good faith, but whose claims were rejected, might receive compensation for the value of any improvements they had erected on their lands, or for the full value of their lands if they had purchased those lands and entered them before 1912 under a deed purporting to convey title. §§ 7, 15.

After the Board determined who owned each parcel of land, the Act foresaw that some consolidation of each Pueblo's land holdings might occur. The Board was directed to identify any parcels adjacent to a Pueblo settlement that should be purchased from non-Indian owners for transfer to the Pueblo. § 8. In addition, § 16 of the Act authorized the Secretary of the Interior, with consent of the Pueblo, to sell any lands owned by the Pueblo that were "situate among lands adjudicated or otherwise determined in favor of non-

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on the Pueblo's behalf concerning the same parcel of real estate. The Government filed a motion to expedite consideration of the case, informing the Court of the enactment of the Pueblo Lands Act, and noting that "[t]he Chairman [of the Pueblo Lands Board] has informed the Attorney General that an early determination of this case will be helpful to the Board in the discharge of its duties and functions under this Act." Motion to Advance of United States, O. T. 1925, No. 208, p. 2. In holding that the quiet title action was not barred, the Court expressly observed that the Pueblos were "Indian tribes" within the meaning of the Nonintercourse Act. *United States* v. *Candelaria*, 271 U. S. 432, 441–442 (1926). The practical result was that non-Indian claimants to Pueblo lands could only raise the defenses set out in § 4. Unlike *Candelaria*, the present controversy involves a transaction that occurred after the passage of the Pueblo Lands Act and which is therefore governed by § 17.

Indian claimants and apart from the main body of the Indian land."[18]

The foregoing provisions of the Pueblo Lands Act were all designed to settle the consequences of past transactions. In contrast, the section we must construe in this case—§ 17—was entirely concerned with transactions in Pueblo lands that might occur in the future. It provides:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, *and* no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." 43 Stat. 641–642 (emphasis added).

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[18] The complete text of § 16 provides:

"That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated."

The question to be decided here is whether the second clause—the language following the word "and"—indicates that a Pueblo may convey good title to its lands with the approval of the Secretary of the Interior.

III

In 1905 Mountain States' predecessor allegedly acquired a right-of-way and constructed a telephone line across land owned by the Pueblo of Santa Ana. App. 8. Presumably the 1905 conveyance would have been invalid under the Nonintercourse Act. See n. 17, *supra*. In all events, in 1927 the United States, acting as guardian for the Pueblo of Santa Ana, brought an action in the United States District Court for the District of New Mexico to quiet title to the lands of that Pueblo.

While the litigation was pending, the Pueblo entered into a right-of-way agreement with Mountain States granting it an easement "to construct, maintain and operate a telephone and telegraph pole line" on the land now in dispute. App. 39.[19] The agreement was forwarded to the Secretary of the Interior by the Bureau of Indian Affairs with the recommendation that it be approved under § 17. *Id.*, at 181–183. This agreement was approved, and the approval was received, and endorsed on the right-of-way agreement. *Id.*, at 43. On the Government's motion,[20] *id.*, at 36, the District Court thereafter dismissed Mountain States from the quiet title

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[19] The consideration paid for the easement was $101.60 or 80 cents a pole for 127 poles. App. 181.

[20] The Government's motion read in part:

"[S]ubsequent to the institution of this suit [Mountain States] has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and . . . thereby [Mountain States] has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between [the Pueblo] and [Mountain States]." *Id.*, at 36.

action on the ground that it had "secured good and sufficient title to the right of way and premises in controversy . . . in accordance with the provisions of Section 17 of the Pueblo Lands Act."[21]

Mountain States removed the telephone line in 1980. On October 10 of that year, the Pueblo brought this action claiming trespass damages for the period prior to the removal of the line. The District Court granted partial summary judgment for the Pueblo on the issue of liability, holding that the grant of the right-of-way in 1928 was not authorized by § 17. *Id.*, at 86–92.

The Court of Appeals allowed an interlocutory appeal under 28 U. S. C. § 1292(b) and affirmed. 734 F. 2d. 1402 (CA10 1984). The court held that Pueblo lands were protected by the Nonintercourse Act prior to 1924 and that § 17 of the Pueblo Lands Act did not authorize any conveyance of such lands. It reasoned:

> "The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive 'and.' To us that means exactly what it says. No alienation of the Pueblo lands shall be made 'except as may hereafter be provided by Congress' *and* no such conveyance 'shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.' Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and [Mountain States], Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided

[21] *Id.*, at 37. Mountain States has argued that the 1928 dismissal precludes the Pueblo from challenging the validity of the 1928 right-of-way agreement. Brief for Petitioner 39–47. The Court of Appeals held that the dismissal of the quiet title action in 1928 was not a ruling on the merits that would bar this action. 734 F. 2d 1402, 1407–1408 (CA10 1984). In view of our disposition of the case, however, we do not evaluate the merits of this contention.

> no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause." *Id.*, at 1406.

The Court of Appeals considered and rejected Mountain States' reliance on the legislative history of the 1924 Act and its construction by the Secretary of the Interior.

Our concern that the Court of Appeals' interpretation of the Act might have a significant effect on other titles acquired pursuant to § 17 led us to grant certiorari. 469 U. S. 879 (1984). We now reverse.

IV

The word "hereafter" in the first clause of § 17 supports the Court of Appeals' interpretation of the Act. Read literally, the statute seems to state unequivocally that no interest in Pueblo lands can be acquired "except as may hereafter be provided by Congress"—or, stated somewhat differently, until Congress enacts yet another statute concerning the lands of the Pueblo Indians of New Mexico.

The problem with this construction of the statute is that the requirement of the Secretary's approval in the second clause of § 17 would be a nullity until Congress acts. Even if a later Congress did enact another statute authorizing the alienation of Pueblo lands, that Congress would be entirely free to accept or reject that requirement. Neither the Pueblo nor the Court of Appeals has offered any plausible reason for attributing this futile design to the 68th Congress. In light of "the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative," *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979), the second clause of § 17 cannot be read as limiting the power of Congress to legislate in the "hereafter."[22]

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[22] Congress did pass Acts in 1926, 44 Stat. 498 and 1928, 45 Stat. 442, authorizing the condemnation of rights-of-way over Pueblo lands, but these Acts were enacted in response to Pueblos that refused to make voluntary conveyances of easements to utilities and common carriers. See H. R. Rep. No. 955, 69th Cong., 1st Sess., 2 (1926). Thus, the 1926 and 1928

The Court of Appeals' literal interpretation of the first clause of § 17 would also nullify the effect of § 16. See n. 18, *supra*. The design of the Pueblo Lands Act indicates that Congress thought some consolidation of Pueblo land holdings might be desirable in connection with the claims settlement program to be promptly implemented by the Pueblo Lands Board. See *supra*, at 245–246. To this end, § 16 purports to authorize conveyances of Pueblo lands with the consent of the governing authorities of the Pueblo and the approval of the Secretary of the Interior. If the Court of Appeals' literal construction of § 17 were accepted, the consolidation of properties foreseen by § 16 could have been implemented only as Congress might thereafter provide. It is inconceivable that Congress would have inserted § 16 in the comprehensive settlement scheme provided in the Act if it did not expect it to be effective forthwith.

Finally, the practical effect of the Court of Appeals' interpretation is to apply the requirements of the Nonintercourse Act to voluntary transfers of Pueblo lands. In 1924, Congress logically could have adopted any of three approaches to voluntary transfers. It could have left the matter to be decided by the courts; applied the rule of the Nonintercourse Act; or adopted a new rule of law. A review of the structure of the statute convinces us that Congress followed the last course.

In arguing that § 17 simply extended the provisions of the Nonintercourse Act to the Pueblos, the Pueblo relies on language in the first clause of the section. However, it is the second—not the first—clause of § 17 that closely resembles the language and structure of the Nonintercourse Act:

> Section 17:
>
> "[N]o sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any

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Acts were designed to supplement the authority provided in the second clause of § 17, not replace it.

> pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."
>
> Nonintercourse Act:
>
> "[N]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

The language is slightly—but significantly—altered to provide for approval by the Secretary of the Interior instead of ratification by Congress.

In any case, if Congress had intended to apply the Nonintercourse Act to these lands, it is difficult to understand why it did not say so in simple language. When Congress considered it appropriate in the Act to extend generally applicable Indian statutes to the Pueblos it did so with concise language directed to that end.[23] Indeed, in view of subsequent events, Congress might have achieved that result simply by omitting § 17 from the Act and leaving the matter to the courts. See n. 17, *supra*. In our view, it is much more likely that Congress intended to authorize a different procedure for Pueblo lands in view of their unique history—a history that is discussed at some length in the Committee Reports.[24]

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[23] For example, § 4 of the Act recognized that a Pueblo might bring its own action to quiet title "*Provided, however,* That any contract entered into with any attorney or attorneys by the Pueblo Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States." 43 Stat. 637; S. Rep. No. 492, at 7.

[24] Francis Wilson, a representative for the Pueblos, apparently originated the first draft of § 17. In a letter to the Commissioner of Indian Affairs he explained that "Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. . . . This section is intended to cover the same ground as [the Nonintercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians." App. to Brief in Opposition 12.

V

There is another reading of the statute that better harmonizes the two clauses of § 17 with the structure of the entire Act and with "its contemporary legal context."[25] After the *Joseph* decision, it was generally assumed that questions of title to Pueblo lands were to be answered by reference to New Mexico law, rather than to federal law. In 1924, Congress was legislating without the benefit of a clear holding from this Court that the Pueblos had been completely assimilated to the status of Indian tribes whose land titles were protected by federal law. *Sandoval* had established that the Indian liquor law applied to the Tribe, and had strongly implied that the Nonintercourse Act would also apply; but Congress surely wanted to make clear that state law, for the future, was entirely pre-empted in this area, and that Congress had assumed complete jurisdiction over these lands. The first clause of § 17 is fairly read as a flat prohibition against reliance on New Mexico law in connection with future transactions involving Pueblo lands. After 1924, alienation of those lands, voluntary or involuntary, was only to occur if sanctioned by federal law.

While the first clause of § 17 refers generally to the acquisition of any "right, title, or interest in . . . lands of the Pueblo Indians," the second clause refers to any "sale, grant, lease . . . or other conveyance of lands." This language plainly refers to transfers of land freely made by a Pueblo. The second clause of § 17 is logically interpreted as providing a firm command, as a matter of federal law, that no future conveyance should be valid without the approval of the Secretary of the Interior. The language suggests that Congress assumed that the Secretary of the Interior could adequately protect the interests of the Pueblos in connection with future land transactions. This construction is supported by the language of § 16 allowing for the consolidation of Pueblo lands

[25] See *Cannon* v. *University of Chicago*, 441 U. S. 677, 699 (1979).

with the consent of the Pueblo and if "the Secretary of the Interior deems it to be for the best interest of the Indians."[26]

This interpretation of § 17 gives both clauses a meaning that is consistent with the remainder of the statute and with the historical situation of the Pueblos.[27] It is consistent with the limited legislative history available,[28] and is supported by

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[26] The Pueblo argues that the specific authority conferred by § 16 would be superfluous if § 17 is interpreted as generally authorizing conveyances with the approval of the Secretary. Provisions similar to § 16, however, were contained in early versions of the bill that did not contain § 17, see S. Rep. No. 1175, 67th Cong., 4th Sess., 5 (1923); H. R. Rep. No. 1730, 67th Cong., 4th Sess., 3, 7 (1923), and it was probably considered to be an isolated element in the comprehensive claims settlement procedure established by the Act, rather than a provision of general applicability like § 17. Section 16 was also no doubt designed to encourage the Secretary to take the initiative in urging the Pueblos to consolidate their land holdings after the Board's work was completed.

[27] The word "hereafter" in the first clause of § 17 remains a puzzle even under this interpretation. It may be that Congress inadvertently used the word "hereafter" when it intended to say "herein" or "hereinafter"; or perhaps when the word "hereafter" was included in the bill, the subsequent date of enactment might have been regarded as part of the "hereafter." In any case, this ambiguity in the first clause of § 17 does not alter the clarity of the rule of law established in the second.

[28] During the Senate Hearings the Chairman of the Subcommittee considering the bills on the Pueblo lands problem referred to the desirability of authorizing the Pueblos to convey their lands with the approval of the Secretary:

"Senator LENROOT. Have we not general legislation that provides for the alienation of Indian lands with the consent of the Secretary of the Interior?

"Commissioner BURKE. Certainly, as to all Indians, except the Pueblos.

"Senator LENROOT. They are not included in the statute?

"Commissioner BURKE. No; and no tribal lands can be alienated except by act of Congress. This land is not allotted.

. . . . .

"Mr. WILSON [representing Pueblos]. There is special legislation covering [the Five Civilized Tribes], and in the *Sandoval* case the court, in speaking of the tenure to lands of the Pueblo tenants, compared them directly with the tenure of the Five Civilized Tribes. That is patented land, but there was a parallel drawn in the mind of the court, which intended to

the contemporaneous opinion of the Secretary of the Interior and the Federal District Judge who placed a stamp of approval on this transaction and numerous others in the years following the enactment of the Pueblo Lands Act in 1924.[29] The uniform contemporaneous view of the Executive Officer responsible for administering the statute and the District Court with exclusive jurisdiction over the quiet title actions brought under the Pueblo Lands Act[30] "is entitled to very great respect."[31] These individuals were far more likely to

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convey the idea that the Pueblo lands could be handled in precisely the same way as the land of the Five Civilized Tribes.

"Senator LENROOT. I should like to have you consider whether it might not [be] advisable to provide that these lands may be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior.

"Mr. WILSON. That is probably going to be quite desirable under some conditions. In fact we have at different times rather encouraged the idea that if they could make swaps and transfers they could get their lands into much better condition. In fact that was the policy at one time that we had with reference to it.

"Senator LENROOT. Mr Commissioner, would there be any objection to that on the part of the Government.

"Commissioner BURKE. I do not think so. I think there should be authority so that where it was in the interest of the Indians, they might convey, but I would have it under strict supervision of the Department." Senate Hearings, at 155.

Sections 16 and 17, authorizing conveyances of Pueblo lands with the approval of the Secretary of the Interior, appeared in later versions of the bill. See also n. 24, *supra*.

[29] In 1926, a Special Assistant to the Attorney General offered the same construction of the second clause of § 17 that we adopt today. See App. to Brief for Petitioner 3a–4a. As a result of this construction, the Secretary approved at least 8 other conveyances involving the Pueblo of Santa Ana, between 1926 and 1958, App. 112–115, 129–180, and more than 50 involving other Pueblos. Many of the early transactions also involved dismissals from quiet title actions brought by the United States under the Pueblo Lands Act. See Brief for United States as *Amicus Curiae* 23; *supra*, at 247–248.

[30] §§ 1, 3, 43 Stat. 636.

[31] *Edwards' Lessee* v. *Darby*, 12 Wheat. 206, 210 (1827). See also *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450–451 (1978); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933).

have had an understanding of the actual intent of Congress than judges who must consider the legal implications of the transaction over half a century after it occurred.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Section 17 of the Pueblo Lands Act of 1924, 43 Stat. 641–642, provides in full:

> "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This awkward and obscure provision is a striking illustration of the fact that statutory phraseology sometimes is "the consequence of a legislative *accident*, perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should." *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 97 (1977) (STEVENS, J., dissenting) (emphasis added). Section 17's opaque language has given rise to not just two conflicting interpretations, but to literally a multitude of proffered readings—each of which attempts to rationalize the ambiguous words, phrases, and clauses and to explain away apparently incon-

sistent or inoperative language, and each of which ultimately fails to meld the language into a coherent whole.[1] This muddle is perhaps best illustrated by the fluctuating construction given to § 17 by the Department of the Interior over the past 60 years. See *infra*, at 270–275. And while the Court offers up its own attempt to "harmoniz[e]" the anomalies of § 17, *ante*, at 252, it must ultimately concede that some aspects of § 17 "remai[n] a puzzle even under [its] interpretation," *ante*, at 253, n. 27.

I would have thought that the Court, in attempting to drain this statutory bog, would turn naturally to the canons of construction that have governed Indian-law questions for the past two centuries—canons designed specifically to resolve ambiguities in construing provisions such as § 17, and which grow directly out of the federal trust responsibilities that define the conduct of Congress, executive officials, and the courts with respect to Indian tribes.[2] Instead, the Court wholly ignores these canons and boldly pronounces its own revisionist interpretation of the statute that goes far beyond even the Government's current reading. Under the Court's view, Congress intended by § 17 to give the 19 Pueblo Tribes a power possessed by *no* other Indian tribe—the power to alienate their *unalloted* tribal lands freely without any restrictions, subject only to the approval of the Secretary of the Interior, and without any guidelines respecting the

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[1] See, *e. g.*, Brief for Petitioner 16–32; Brief for Respondent 12–32; Brief for United States as *Amicus Curiae* 11–16; Brief for Atchison, Topeka and Santa Fe Railway Co. as *Amicus Curiae* 9–16; Brief for Public Service Co. of New Mexico as *Amicus Curiae* 11–18; Brief for State of New Mexico as *Amicus Curiae* 3–7; Brief for Pueblo of Taos as *Amicus Curiae* 5–21; Brief for Pueblo de Acoma as *Amicus Curiae* 11–13; Brief for All Indian Pueblo Council et al. as *Amici Curiae* 7–20.

[2] See, *e. g.*, *United States* v. *Mitchell*, 463 U. S. 206, 225 (1983); *Tulee* v. *Washington*, 315 U. S. 681, 684–685 (1942); *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 17 (1831). See generally F. Cohen, Handbook of Federal Indian Law 220–228 (1982) (Cohen).

manner, scope, requirements, or timing of the Secretary's supervision.

I dissent. I believe § 17 more plausibly is read simply as an attempt by Congress to reaffirm and clarify the full applicability to the Pueblo Tribes of general federal restraints against alienation of Indian lands and the exceptions thereto. This interpretation better reflects the structure of the Pueblo Lands Act and the spirit in which it was enacted. The Court's interpretation, on the other hand, flies in the face of both the Pueblo Lands Act and of legislation enacted prior to and after the Act; misconstrues the legislative history; overlooks evidence concerning the origins and consistency of the administrative interpretation to which the Court now purports to defer; and flouts the fiduciary relationship owed to Indian tribes and the canons of construction that serve to preserve that relationship.

I

As the Court acknowledges, § 17 must be examined in light of "'its contemporary legal context.'" *Ante*, at 252. Alienation of Indian lands, in 1924 as now, was governed by the principles of the Nonintercourse Act, which provides that "[n]o purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."[3] Congress ceased entering into treaties with Indian tribes in 1871,[4] but the Nonintercourse Act has continued to define the essential characteristics of Indian title in this country: that all questions concerning Indian property are pre-empted by federal law, and that interests in

[3] Trade and Intercourse Act of 1834, § 12, Rev. Stat. § 2116, 25 U. S. C. § 177.

[4] Appropriations Act of Mar. 3, 1871, § 1, Rev. Stat. § 2079, 25 U. S. C. § 71. See also *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 118–124 (1960).

Indian lands can be conveyed only pursuant to explicit congressional authorization.[5]

Since 1871, Congress has permitted interests in unallotted Indian lands to be conveyed in two ways: first, through specific statutes authorizing alienation of particular tribal lands; and second, through general statutes authorizing the transfer of limited interests in Indian lands subject to the approval of the Secretary of the Interior.[6] A number of statutes in this second category were enacted at the end of the 19th century and early in the 20th century, and authorized such limited conveyances as leases for farming, grazing, and oil, gas, and mineral development; rights-of-way for highways, railways, and utilities; and sales of timber.[7] These statutes typically placed strict limits on the Secretary's authority by, *inter alia*, prescribing the price and term of years for which interests could be conveyed, providing for the collection of special taxes and royalties for the benefit of the affected tribes, placing restrictions on the geographic scope of conveyances, establishing procedural safeguards for the tribal owners, and requiring the promulgation of rules and regulations by which the Secretary would exercise his authority.

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[5] See, *e. g.*, *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U. S. 661, 667–670 (1974); *United States ex rel. Hualpai Indians* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 347 (1941). See generally Cohen 510–522.

[6] See *id.*, at 516, and nn. 48–51; *id.*, at 517 (summarizing legislation).

[7] See, *e. g.*, Act of Feb. 28, 1891, § 3, 26 Stat. 795, 25 U. S. C. § 397 (grazing and mining leases); Act of Aug. 15, 1894, § 1, 28 Stat. 305, 25 U. S. C. § 402 (farming leases); Act of Mar. 2, 1899, § 1, 30 Stat. 990, as amended, 25 U. S. C. § 312 (railroad, telephone, and telegraph rights-of-way); Act of Mar. 3, 1901, § 3, 31 Stat. 1083, 25 U. S. C. § 319 (telephone and telegraph rights-of-way); Act of Mar. 11, 1904, §§ 1, 2, 33 Stat. 65, as amended, 25 U. S. C. § 321 (pipelines); Act of Mar. 3, 1909, 35 Stat. 781, as amended, 25 U. S. C. § 320 (reservoirs); Act of June 25, 1910, § 7, 36 Stat. 857, as amended, 25 U. S. C. § 407 (timber sales); Act of June 30, 1919, § 26, 41 Stat. 31, as amended, 25 U. S. C. § 399 (oil and gas leases); Act of May 29, 1924, 43 Stat. 244, 25 U. S. C. § 398 (mining leases).

Congress had extended the Nonintercourse Act to the Territory of New Mexico in 1851,[8] but from shortly after the Civil War until 1910, the territorial courts, sustained by this Court, barred application of the Act to the Pueblos on the grounds that they were not really "Indians." See, *e. g.*, *United States* v. *Joseph*, 94 U. S. 614 (1877); *United States* v. *Lucero*, 1 N. M. 422 (1869). As the Court subsequently conceded, however, this interpretation was erroneous: with respect to "the status of the Pueblo Indians and their lands," the Pueblos always have been "Indians in race, customs, and domestic government" and "like reservation Indians in general." *United States* v. *Sandoval*, 231 U. S. 28, 38–39, 41 (1913). Accordingly, the Court has repeatedly reaffirmed that the Pueblos have the same status as all other federally recognized Indian tribes and that the 1851 Act clearly and fully extended the Nonintercourse Act to them.[9]

In order to reassert its authority over the Pueblos, Congress in the New Mexico Enabling Act of June 20, 1910, provided as a condition for statehood that "all lands . . . owned or held by any Indian or Indian tribes . . . shall be and remain subject to the . . . absolute jurisdiction and control of the Congress of the United States," and that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them."[10]

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[8] Act of Feb. 27, 1851, § 7, 9 Stat. 587: "[A]ll the laws now in force regulating trade and intercourse with the Indian tribes, or such provisions of the same as may be applicable, shall be, and the same are hereby, extended over the Indian tribes in the Territories of New Mexico and Utah."

[9] See, *e. g.*, *United States* v. *Chavez*, 290 U. S. 357, 360–365 (1933); *Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, 320–321 (1927); *United States* v. *Candelaria*, 271 U. S. 432, 439–443 (1926).

[10] Act of June 20, 1910, § 2, 36 Stat. 559, 560. See also N. M. Const., Art. XXI, § 2 (adopted Jan. 21, 1911) ("The people inhabiting this state do agree and declare that they forever disclaim all right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the

After the Enabling Act and the Court's decision in *Sandoval*, the Department of the Interior began to supervise leasing and grants of rights-of-way pursuant to the statutes summarized above. Numerous such conveyances were subjected to its supervision between 1910 and the enactment of the Pueblo Lands Act in 1924,[11] and during its consideration of the 1924 Act Congress was informed that the leasing and right-of-way statutes were being applied to the Pueblos "to the same extent" as other Indian tribes.[12]

The first 16 sections of the Pueblo Lands Act set forth a comprehensive mechanism for resolving the thousands of disputed land claims that resulted from the Pueblos' uncertain status after the Court's decision in *Joseph* and prior to the

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United States, or any prior sovereignty; and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States").

[11] 1 L. Kelly, Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice 7, 21 (unpublished manuscript 1984) (Kelly); 2 *id.*, at 128–135 (Exs. 27–29). See n. 34, *infra*.

[12] Hearings on S. 3865 and S. 4223 before a Subcommittee of the Senate Committee on Public Lands and Surveys, 67th Cong., 4th Sess., 72–73 (1923) (1923 Senate Hearings):

"Senator LENROOT. Has the department ever exercised or attempted to exercise any control over the alienation of property by these Indians?

"Colonel TWITCHELL. Since the enabling act, yes; and since the Sandoval case in particular. The leases that have been made by these Indians which have been made since that time, as I understand it, required the consent of the superintendent.

. . . . . .

"Senator LENROOT. . . . [M]y point was whether the department was making any disclaimer with reference to protecting their rights, and alienation of property, or things of that sort?

"Commissioner BURKE. Not at all, Mr. Chairman, we are going to the same extent.

"Senator LENROOT. I supposed so."

See also Hearings on H. R. 13452 and H. R. 13674 before the House Committee on Indian Affairs, 67th Cong., 4th Sess., 40–41 (1923).

enactment of the Enabling Act and the decision in *Sandoval*. See *ante*, at 244–246. I believe that § 17—described by its author as "the shortest way to prevent existing conditions from recurring or existing again"[13]—is best read simply as a declaratory reaffirmation of the full applicability to the Pueblos of the Nonintercourse Act as it stood in 1924. Thus, the first clause of § 17—prohibiting the acquisition of Pueblo title under New Mexico law or in "any other manner" except as provided by Congress—served merely to reaffirm the federal pre-emption of all questions concerning Pueblo lands. The second clause of § 17—prohibiting any form of "conveyance . . . unless the same be first approved by the Secretary of the Interior"—can quite similarly be read as merely confirming that conveyances of interests in Pueblo lands must have secretarial approval—*where Congress otherwise has created a mechanism for the Secretary to approve particular conveyances.*

This reading does, of course, render § 17 redundant of then-existing law. But as the Court repeatedly has acknowledged, Congress' historical practice in Indian-law enactments frequently has been to include such general policy declarations and reaffirmations of the status quo. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 391–392 (1976); *Johnson and Graham's Lessee* v. *McIntosh*, 8 Wheat. 543, 604 (1823). See also *Arizona* v. *San Carlos Apache Tribe*, 463 U. S. 545, 562–563 (1983) (*re* disclaimer clauses in state Enabling Acts). Contrary to the Court's revisionist view, Congress had no doubt whatsoever that questions of Pueblo title *already* had been pre-empted by the Enabling Act,[14] and the first clause of

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[13] Letter from Francis C. Wilson to Charles H. Burke, at 1 (Dec. 18, 1923), reprinted in 2 Kelly 35 (Ex. 37). See n. 31, *infra*.

[14] The Court believes that Congress intended to "adop[t] a new rule of law" rather than to "apply the Nonintercourse Act to these lands." *Ante*, at 250, 251. See also *ante*, at 244, n. 17 ("The Act itself did not purport to resolve the question whether the Nonintercourse Act applied to the Pueblos"). But Congress *already* had extended the Nonintercourse Act to the

§ 17 can therefore be nothing more than a reaffirmation of federal pre-emption. The second clause of § 17 is part of the same sentence as the first, is linked to the first by the conjunctive "and," and is phrased in the same prohibitory terms—suggesting a similarity of purpose under any reasonable canon of construction.[15] I therefore conclude that § 17, placed in the context of the Nonintercourse Act, the Enabling Act, and the various leasing and right-of-way statutes then in effect, is most comprehensible if viewed simply as reaffirming the status quo represented by those statutes and the *Sandoval* decision. As set forth below, this unambitious construction best accords with the structure of the Pueblo Lands Act and subsequent congressional legislation, with the legislative history, and with the principles that always have guided us in construing legislation pertaining to Indian tribes.[16]

Pueblos in both the 1851 Act, see n. 8, *supra*, and in the 1910 Enabling Act, see n. 10, *supra*. During the legislative hearings leading to the Pueblo Lands Act it was agreed that Congress already had pre-empted this matter. See, *e. g.*, 1923 Senate Hearings, at 155. See also S. Rep. No. 492, 68th Cong., 1st Sess., 3 (1924) (question had been "finally determined" by *Sandoval* in 1913). Until today, the Court has consistently acknowledged this effect of the 1851 and 1910 Acts. See cases cited in n. 9, *supra*.

[15] See 2A C. Sands, Sutherland on Statutory Construction § 47.16 (4th ed. 1984). See also *infra*, at 277, and n. 65.

[16] As with every other reading of § 17, some anomalies remain under this interpretation. I agree with the Court that the second "hereafter" in the first clause of § 17 could not have been intended to have operative significance. *Ante*, at 253, n. 27. Moreover, the reference to any "conveyance . . . made by . . . any Pueblo Indian living in a community of Pueblo Indians" could not possibly have been meant to have immediate literal effect. Pueblo lands were unallotted and therefore held in fee simple communal title, so an individual Pueblo Indian could not have had the power to convey land. Perhaps Congress intended by this language to encompass the possibility that Pueblo lands might in the future be allotted to individual members. The federal allotment policy came to an end with the enactment of the Indian Reorganization Act of 1934, 48 Stat. 984, as amended, 25 U. S. C. § 461 *et seq.* See generally Cohen 147–149.

II

The Court concludes, however, that Congress intended by the second clause of § 17 to reject application of the Nonintercourse Act "to these lands" and instead to adopt "a new rule of law" authorizing a Pueblo to "convey good title to its lands with the approval of the Secretary of the Interior." *Ante*, at 251, 250, 247.

A. *Statutory Structure*

The Court believes this interpretation "better harmonizes the two clauses of § 17 with the structure of the entire Act." *Ante*, at 252. The Court's interpretation, however, would render wholly superfluous § 16 of the Act, which gave explicit congressional authorization to conveyances of Pueblo lands in one extremely narrow set of circumstances. Specifically, § 16 authorized the sale of land found by the Pueblo Lands Board to belong rightfully to a Pueblo *if* (1) the land "be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land"; (2) the Pueblo and the Secretary concurred in the sale; and (3) the land went to "the highest bidder for cash."[17] The purpose of this provision was to "get

[17] Section 16, 43 Stat. 641, provided in full:

"That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated."

the Indian holdings contiguous to one another." 1923 Senate Hearings, at 154 (Sen. Jones of New Mexico).

The Court argues vaguely that § 16 was "probably considered" an "isolated element" of the Act, and that it somehow uniquely enabled the Secretary to "take the initiative" in "urging" consolidation of Pueblo lands. *Ante*, at 253, n. 26. This unsupported argument is untenable. As the Solicitor for the Department of the Interior emphasized just last year, "[i]t is inconceivable that Congress would have authorized the sale of Pueblo lands under the very narrow circumstances of Section 16, and then one section later would have empowered the Pueblos to alienate their lands for any purpose and with no standards or conditions other than Secretarial approval. Such an irrational result could not have been intended by Congress." [18]

The error of the Court's interpretation is further exposed by the fact that, since 1924, Congress recurrently has enacted legislation affirmatively authorizing much narrower conveyances of interests in Pueblo lands—legislation that would have had no rational basis if, as the Court concludes, Congress *already* had authorized unlimited conveyances of Pueblo lands simply upon secretarial approval. For example: (1) In 1928, in response to concern that the existing easement and right-of-way statutes *might* not technically be applicable to Pueblo lands, Congress enacted legislation clarifying that nine of those statutes, along with "the basic Acts of Congress cited in such sections," were fully "applicable to the Pueblo Indians of New Mexico and their lands." [19]

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[18] Solicitor Frank K. Richardson to Assistant Attorney General F. Henry Habicht II, p. 5 (Oct. 31, 1984) (Richardson Memorandum).

[19] Act of Apr. 21, 1928, 45 Stat. 442, as amended, 25 U. S. C. § 322. Although the Department had consistently applied the general easement and right-of-way statutes to the Pueblos, a new Special Assistant to the Attorney General concluded in 1926 that, as a result of the peculiar wording of the Act of Mar. 2, 1899, pertaining to railroad rights-of-way, "[i]t is not quite certain that it does not include them, but it looks as though it did

These provisions included numerous procedural and financial safeguards governing such conveyances. (2) Congress in 1933 extended the narrow provisions of § 16 to authorize the sale by the Pueblos and the Secretary of *any* land that had been taken from a non-Indian claimant by the Pueblo Lands Board.[20] Congress' purpose was to remove the "restrictions in the sale of [these] lands";[21] the legislation was designed to authorize alienation of Pueblo lands only in "*a limited number of situations*" where necessary to consolidate a tribe's land base.[22] (3) In 1948, Congress authorized the Secretary to grant rights-of-way "for all purposes" across "the lands belonging to the Pueblo Indians in New Mexico," subject to "the consent of the proper tribal officials" of organized tribes.[23] (4) In 1949, Congress authorized the Pueblos and the Secretary to exchange certain Pueblo lands for those in

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not." See *infra*, at 271, and n. 39. On the premise that the 1899 Act was "probably not sufficiently broad to cover the matter," H. R. Rep. No. 955, 69th Cong., 1st Sess., 2 (1926), Congress enacted emergency legislation authorizing condemnation proceedings in federal district court against Pueblo lands. The Act was invalidated as a result of procedural defects, see H. R. Rep. No. 816, 70th Cong., 1st Sess., 1 (1928), and Congress subsequently enacted the 1928 Act to clarify that the general easement and right-of-way provisions were "applicable to the Pueblo Indians of New Mexico," *ibid.*

[20] Act of May 31, 1933, § 7, 48 Stat. 111.

[21] S. Rep. No. 73, 73d Cong., 1st Sess., 4 (1933).

[22] *Id.*, at 17 (emphasis added). Specifically, these situations were those "wherein non-Indian settlements of long standing, recovered for the Pueblos, are not needed by the Pueblos but may more profitably be sold and the proceeds reapplied to the purchase or improvement of lands nearer to the ancient Pueblo villages." *Ibid.* See also H. R. Rep. No. 123, 73d Cong., 1st Sess., 4 (1933) (legislation was designed to permit "the blocking of lands belonging to the tribes").

[23] Act of Feb. 5, 1948, §§ 1, 2, 62 Stat. 17–18, 25 U. S. C. §§ 323, 324. Five of the nineteen Pueblo Tribes organized under the Indian Reorganization Act of 1934, see n. 16, *supra*. H. R. Conf. Rep. No. 94–1439, p. 4 (1976). The Department has long extended this consent requirement to rights-of-way over all Pueblo lands. See 25 CFR §§ 162.2–162.5 (1985).

the public domain "[f]or the purpose of consolidation" of tribal lands.[24] (5) Similar legislation was enacted in 1961 "[f]or the purpose of improving the land tenure pattern and consolidating Pueblo Indian lands."[25] (6) In 1968, Congress authorized the Cochiti, Pojoaque, Tesuque, and Zuni Pueblos to lease their lands for specified purposes "for a term of not to exceed ninety-nine years," except for grazing leases which could not exceed 10 years.[26] This authorization created an exception for these Tribes from the statutory provisions applicable to the other Pueblo Tribes, which limit Indian leasing of restricted lands to 25 years.[27] (7) Congress in 1976 enacted legislation to clarify the full applicability of the general right-of-way provisions to the Pueblos;[28] the purpose was "to place the New Mexico Pueblo Indians in the same position relative to grants of rights-of-way across their lands as other federally recognized Indian tribes."[29]

Each of these enactments would have been meaningless if § 17 already authorized Pueblo leases of unlimited duration and even outright sales of land. The enactments of 1924, 1933, 1947, and 1961 clearly demonstrate that Congress has authorized alienation of Pueblo lands *only* where necessary to consolidate the tribal base and to improve land tenure patterns—a carefully crafted effort that the Court's interpretation today annuls. Similarly, the enactments of 1928, 1948, 1968, and 1976 demonstrate Congress' intent that leases and rights-of-way on Pueblo lands be subject to the same procedural and financial safeguards that govern such conveyances on Indian lands generally—an intent that is irreconcilable with the notion that § 17 created an entirely independent avenue for alienation of Pueblo title subject only to standardless secretarial approval.

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[24] Act of Aug. 13, 1949, § 2, 63 Stat. 605, 25 U. S. C. § 622.
[25] Pub. L. 87–231, § 10, 75 Stat. 505, 25 U. S. C. § 624.
[26] Pub. L. 90–570, 82 Stat. 1003, as amended, 25 U. S. C. § 415.
[27] *Ibid.*
[28] Pub. L. 94–416, § 3, 90 Stat. 1275, 25 U. S. C. § 322.
[29] H. R. Conf. Rep. No. 94–1439, at 4.

B. *Legislative History*

The Court explains, however, that its baffling interpretation of § 17 is "consistent with the limited legislative history available." *Ante*, at 253. All the Court can offer in support of this assertion is a carefully distilled excerpt from a colloquy between Senator Lenroot and Francis Wilson, an attorney for the Pueblos, during a 1923 Senate hearing. *Ante*, at 253–254, n. 28. Senator Lenroot inquired "whether it might not [be] advisable to provide that these lands may be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior," and Wilson replied that it would be "quite desirable under some conditions." 1923 Senate Hearings, at 155.

Unfortunately, the Court omits some rather crucial language demonstrating that the *entire* colloquy it relies upon pertained to § 16 rather than to § 17. Senator Lenroot began by asking: "Might there be cases where it would be to the interest of the Indians to sell?" *Id.*, at 154. Wilson responded that "I can not think of one. There might be, but I have not any in mind." *Ibid.* Senator Jones of New Mexico then suggested that "where there are allotments, strips here and there, where the title has been divested from the Indian, might it not be advisable as to the strips where non-Indians have not the title, interspersed with strips where non-Indians have the title, that there be some disposition of that land so as to get the Indian holdings contiguous to one another." *Ibid.* Everyone present agreed that "[i]t would be very desirable." *Ibid.* (Wilson).

The participants turned next to the question whether the Secretary could authorize such conveyances. As was "true generally of the Indian law," it was agreed that the Secretary could not have "anything to do with it" because "Congress has taken full jurisdiction of the sale of this land," and would therefore "[a]bsolutely" have "to legislate upon it." *Id.*, at 155 (Sen. Lenroot, Comm'r Burke, Mr. Renehan, Sen. Jones). It was only at this point that Senator Lenroot queried whether Congress should provide that "*these* lands may

be sold or alienated," and Wilson agreed that it would be "quite desirable under some conditions." *Ibid.* Wilson then identified what the "some conditions" were—where the Pueblos "could make swaps and transfers [so] they could get their lands into much better condition." *Ibid.*

This "limited" legislative history, *ante*, at 253, therefore demonstrates that (1) all participants understood that Congress would have to give its approval to any alienation of Pueblo lands, and (2) Congress intended to do so only where necessary "to get the Indian holdings contiguous to one another"—the precise function of the narrowly drafted § 16. Nowhere was it suggested that Congress, after hammering out this limited authorization for alienation of *some* Pueblo lands, would then intend to authorize alienation of *all* Pueblo lands.[30]

Section 17 was drafted by Francis Wilson, an attorney representing the *Pueblos* in the legislative proceedings,[31] and the Court has not suggested how a provision drafted by Indian advocates who were urging simply that the Pueblos be treated like other tribes could possibly have been intended to override the restraints against alienation set forth in the

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[30] The Court apparently believes that a comparison of the Pueblos to the "Five Civilized Tribes" during the colloquy discussed above supports its conclusion that Congress intended to authorize outright alienation of Pueblo lands subject only to secretarial approval. See *ante*, at 253–254, n. 28. But the tribal lands of the Five Tribes, most of which were allotted around the turn of the century, were made inalienable for specified periods of time, restrictions that have been extended on allotments of tribal members of half or more Indian blood subject to detailed congressional standards for relaxing the restrictions. See generally Cohen 785–788. Contrary to the Court's implication, there is no parallel between management of the Five Tribes' property and management of Pueblo property under the Court's interpretation of § 17.

[31] See, *e. g.*, Letter from Francis Wilson to Roberts Walker, at 3 (Nov. 5, 1923), reprinted in 2 Kelly 3 (Ex. 1); Letter from Francis C. Wilson to Charles H. Burke, at 2 (Nov. 26, 1923), reprinted in 2 Kelly 7 (Ex. 2). See generally 1 Kelly 10–11.

Nonintercourse Act. That § 17 was simply intended as a declaratory reaffirmation of the full scope of the Nonintercourse Act is best illustrated by the fact that it provoked *no* debate, commentary, or opposition. The much more modest § 16, on the other hand, engendered sharp controversy.[32] As one historian concluded after reviewing all available legislative history, departmental records, and private correspondence, there is

> "nothing in the record to indicate that Wilson or anyone else intended or interpreted Section 17 as authorizing the Pueblos to convey their lands to any greater extent than other Indians, or otherwise modifying the Non-Intercourse Act in any substantive way. Such a construction, if circulated at that time, would certainly have provoked heated debate and opposition from the Collier group and others,[33] especially since sales by individuals and tribal officials had in part caused the turmoil that led to the Act. What is remarkable about Section 17 is that it was so easily accepted, apparently by consensus. Almost alone among the lengthy provisions of the various bills, it was undisputed and unamended."[34]

After a similar review, the Solicitor for the Department of the Interior found only last year that "[n]owhere in the legislative history is there any suggestion that Section 17 was

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[32] See, *e. g.*, 1923 Senate Hearings, at 105–106, 154–155.

[33] The reference is to John Collier, who became Commissioner of Indian Affairs in 1933. Collier and organizations that he represented were opposed to further alienation of the Indian tribal base, and they played an active role in the enactment of the Pueblo Lands Act. 1 Kelly 5–20. Many of Collier's views against further alienation became law upon enactment of the Indian Reorganization Act of 1934, see n. 16, *supra*. See generally Cohen 144–149.

[34] 1 Kelly 14. This report was prepared under contract with the Bureau of Indian Affairs of the Department of the Interior, and is based on, *inter alia*, administrative records stored at the National Archives and the New Mexico State Archives.

intended to grant the Pueblos and the Secretary the power to alienate Pueblo lands."[35] The Court has offered nothing plausibly suggesting the contrary.

C. *Administrative Construction*

The Court explains, however, that the "uniform contemporaneous view" of executive officials commands "'very great respect.'" *Ante*, at 254. Even if this were an appropriate case to defer to a consistent administrative construction,[36] the checkered history of the Department of the Interior's construction of § 17 demonstrates that the Court's purported deference is wholly unwarranted. "We have recognized previously that the weight of an administrative interpretation will depend, among other things, upon 'its consistency with earlier and later pronouncements' of an agency." *Morton* v. *Ruiz*, 415 U. S. 199, 237 (1974), quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). See also *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U. S. 27, 38–39 (1981); *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U. S. 694, 718–719 (1975). The record demonstrates that the Department's construction of § 17 has swung wildly back and forth over the past 60 years.

For the first two years after the Pueblo Lands Act was enacted, the Secretary routinely applied the general right-of-way statutes to the Pueblo, as he had prior to the Act.[37] Among the numerous rights-of-way granted pursuant to these restrictive provisions were 50-year easements to the petitioner Mountain States Telephone and Telegraph Com-

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[35] Richardson Memorandum, at 4.

[36] In light of the canons of construction requiring (1) a "plain and unambiguous" expression of congressional intent to lift restraints on alienation, see *infra*, at 275–279, and (2) that all ambiguities in legislation be resolved in favor of preserving Indian rights and title, see n. 66, *infra*, this is not an appropriate case for invoking the usual rules of deference to administrative actions. See generally *Morton* v. *Ruiz*, 415 U. S. 199, 236–237 (1974); Cohen 225–228.

[37] 1 Kelly 14–17, 20–21; see also 2 *id.*, at 149–150 (Ex. 35).

pany.[38] Never was there even a hint that § 17 might have worked any change in the law or in the narrow exceptions to Congress' policy against alienation.

In 1926, however, a new Special Assistant to the Attorney General, George A. H. Fraser, concluded that the existing right-of-way statutes *probably* did not cover the Pueblos: "It is not quite certain that [the statutes do] not include them, but it looks as though [they] did not."[39] Moreover, Fraser concluded that the first clause of § 17—prohibiting any alienation "except as may *hereafter* be provided by Congress"—meant literally that no transfer of any interest in Pueblo land could occur until Congress acted at some undetermined point in the future.[40] Fraser accordingly began filing trespass suits pursuant to the Pueblo Lands Act against railroad companies and utilities that had rights-of-way across Pueblo lands.[41]

These companies, obviously, were not anxious to submit to extended litigation. A representative of one of them stated that it was essential to find a method to get easements and rights-of-way "railroaded thru" the federal bureaucracy with a minimum of delay.[42] The record clearly shows that the construction of § 17 to permit Pueblo alienation was developed, not by a Government official, but by an attorney for a Chicago bond house underwriting one of the railroads.[43]

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[38] 1 *id.*, at 21; see also 2 *id.*, at 133–135 (Ex. 29) (Secretary's approval).

[39] Letter from George A. H. Fraser to J. M. Baca, at 1 (Apr. 1, 1926), reprinted in 2 Kelly 211 (Ex. 59).

[40] Letter from George A. H. Fraser to Attorney General, at 4 (Nov. 4, 1925), reprinted in 2 Kelly 151 (Ex. 35). See also Letter from George A. H. Fraser to E. W. Dobson, at 4 (Feb. 24, 1926), reprinted in 2 Kelly 161 (Ex. 38).

[41] Letter from George A. H. Fraser to Attorney General, at 5 (Nov. 4, 1925), reprinted in 2 Kelly 152 (Ex. 35); see also 1 *id.*, at 23; 2 *id.*, at 155–161 (Exs. 36–38).

[42] Quoted in 1 *id.*, at 29; see also 2 *id.*, at 214 (Ex. 60).

[43] Letter from George A. H. Fraser to Attorney General, at 3 (Feb. 27, 1926), reprinted in 2 Kelly 164 (Ex. 39); see also Letter from H. J. Hagerman to Charles H. Burke (Mar. 1, 1926), reprinted in 2 Kelly 174

Attorneys with the Office of Indian Affairs believed this new interpretation was "doubtful" and "inconsistent" with the underlying premises of the Pueblo Lands Act.[44] Fraser himself thought it was inconsistent to authorize the Pueblos "to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested."[45] Nevertheless, Fraser recommended and obtained the Secretary's approval of this approach on the theory that "the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17."[46] Agency officials, however, continued to believe the interpretation was "doubtful."[47]

From 1926 until 1933, 55 rights-of-way were obtained by this method.[48] Many of the grantees would otherwise have been forced to defend quiet title suits under the Pueblo Lands Act. By acquiring deeds directly from the Pueblos, they were able either to avoid litigation or to be dismissed out as defendants, as was the petitioner in this case.[49] Fraser described this method as "the cheapest and easiest way of getting rid of" controversies involving Pueblo lands.[50]

(Ex. 42); Letter from Walter C. Cochrane to H. J. Hagerman, at 2 (May 24, 1926), reprinted in 2 Kelly 191 (Ex. 50).

[44] Letter from Walter Cochrane to Charles H. Burke, at 2, 4 (Mar. 1, 1926), reprinted in 2 Kelly 171, 173 (Ex. 41). See also *id.*, at 4: "If the Pueblo Indians are wards of the Government, as they have been decided to be by the court of last resort, it would seem inconsistent with such a theory to hold they have, in any instance, the power to convey their lands."

[45] Letter from George A. H. Fraser to Attorney General, at 4 (Feb. 27, 1926), reprinted in 2 Kelly 165 (Ex. 39).

[46] *Ibid.*

[47] Letter from Walter C. Cochrane to Charles H. Burke, at 1 (Apr. 20, 1926), reprinted in 2 Kelly 234 (Ex. 69).

[48] 1 *id.*, at 38.

[49] See App. 37 (order of dismissal). See also 1 Kelly 36.

[50] Letter from George A. H. Fraser to Joseph Gill, at 1 (May 10, 1928), reprinted in 2 Kelly 344 (Ex. 113).

There usually was "no difficulty . . . at all" in persuading the Pueblos to sign such deeds;[51] a "carload of lumber" was sometimes thrown in to sweeten the deal.[52] As the Solicitor for the Department of the Interior recently observed, this construction of § 17 frequently resulted in the outright avoidance of clearly applicable statutes that would have provided far greater procedural and financial protection to the Pueblos than a process that involved the "mere approval of an existing agreement negotiated by a tribe."[53] Cf. *United States* v. *Locke*, 471 U. S. 84, 124, n. 12 (1985) (STEVENS, J., dissenting) (criticizing the Department of the Interior's use of "every technical construction" of an ambiguous statute to enable the "suck[ing] up" of property "much as a vacuum cleaner, if not watched closely, will suck up jewelry or loose money").

Section 17 was used only sporadically from the 1920's to the 1950's. From 1926 to 1933 there were 55 approvals pursuant to its terms; from 1936 to 1944 there were 13; from 1953 to 1959 there were 11.[54] Section 17 has never been used since 1959 to authorize any Pueblo conveyance.[55] On the other hand, since the 1920's at least 779 rights-of-way over Pueblo lands have been obtained pursuant to the generally applicable right-of-way statutes and in accordance with the strict safeguards contained therein.[56] In the 1940's, the Solicitor for

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[51] Letter from R. H. Hanna to George A. H. Fraser (Mar. 25, 1926), reprinted in 2 Kelly 186 (Ex. 48). The deeds frequently were not actually signed; as the Pueblo of Santa Ana notes with respect to the right-of-way at issue in this case, "none of the Pueblo's officers could even sign his name" and "the original of the easement shows that they thumbprinted it." Brief for Respondent 11, n. 12.

[52] Letter from R. H. Hanna to George A. H. Fraser (Mar. 25, 1926), reprinted in 2 Kelly 186 (Ex. 48). See also 1 *id.*, at 26–27.

[53] Richardson Memorandum, at 5.

[54] 1 Kelly 38.

[55] *Ibid.*

[56] *Ibid.*; see also Richardson Memorandum, at 6: "In the instant case, the Department's reliance on Section 17 falls far short of being consistent. Approximately 75 rights-of-way were approved pursuant to Section 17,

the Department of the Interior concluded that § 17 did *not* authorize the acquisition of rights-of-way and that any such acquisitions must be made pursuant to the general statutes.[57] Nevertheless, § 17 occasionally was invoked thereafter where a "small amount of acreage [was] involved" and in order to avoid "considerable work for . . . the agency."[58] Consistent with the views of the Department in recent generations, the Department's Solicitor concluded last year that "Congress did not intend Section 17 to be construed as authorizing the alienation of Pueblo lands," that the contrary view was "irrational," and that the courts in this case had been correct to "disregard the Department's [earlier] interpretation of that section."[59] And as the Government has emphasized before this Court, the earlier administrative construction—such as it was—applied only to rights-of-way except for one or two isolated incidents, and therefore cannot reasonably support an interpretation of § 17 that would generally authorize outright alienation of Pueblo lands.[60]

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primarily during the period 1928 to 1934. However, a far greater number of rights-of-way were approved pursuant to the 1928 and 1948 Acts."

[57] "The Solicitor in his memorandum of February 25, 1943, held that while grants of rights of way had been made by the Pueblos and approved by the Secretary of the Interior pursuant to Section 17 . . . the Act of April 21, 1928 . . . made applicable to the Pueblos certain acts dealing with rights of way and that these Acts and regulations promulgated thereunder now govern the procedure in the acquisition of such rights of way." Memorandum from W. D. Weekley to Secretary of the Interior (Aug. 14, 1943), reprinted in 2 Kelly 298 (Ex. 98).

[58] Memorandum from William Zimmerman, Jr., to Secretary of the Interior (May 31, 1946), reprinted in 2 Kelly 300 (Ex. 100).

[59] Richardson Memorandum, at 5–6.

[60] Brief for United States as *Amicus Curiae* 27. The record shows, however, that on one occasion in 1928 § 17 was used to validate the sale of 435 acres of Pueblo lands to the townspeople of Bernalillo, N. M. "This acreage was claimed by dozens of claimants in small parcels," 1 Kelly 42, and was interspersed in the town with lands held by non-Indians—the precise situation envisioned by Congress in § 16. Nevertheless, the sale was validated under § 17. The land was acquired from the Pueblos for "slightly

The Court's notion of deference to agency expertise in an Indian case, then, appears to go something like this: where a proffered construction of a statute was not followed for two years but was then advocated by private attorneys and "acquiesce[d]" in by the Government as a matter of convenience; where that construction was then used to avoid the fiduciary safeguards of other legislation but withered away after a decade or two; where the construction was followed in less than 10% of the cases to which it could have been applied; where the construction was rejected by the agency more than 40 years ago and branded "irrational" by the agency's top legal officer just last year; and where the Government has urged that the construction be given a narrow compass at most, this Court as a matter of deference to such a "uniform" construction will adopt the most extreme version of that construction as the law of the land.[61]

D. *Canons of Construction*

Finally, even if the Court's interpretation of § 17 had some plausible basis in the structure of the Pueblo Lands Act or its

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over $6.00 an acre," although the Pueblo Lands Board's "own appraisals valued most of it at several hundred dollars an acre." *Id.*, at 44.

[61] The Court's "deference" to Fraser's 1926 interpretation of § 17's *second* clause, *ante*, at 254, n. 29, is unconvincing for an additional reason. At various times Fraser interpreted § 17's *first* clause as either (1) literally prohibiting *any* acquisition of interests in Pueblo lands unless Congress "hereafter" authorized such acquisitions, or (2) prohibiting *involuntary* transfers of such interests without prior congressional approval. See, *e. g.*, Letter from George A. H. Fraser to Attorney General, at 4 (Nov. 4, 1925), reprinted in 2 Kelly 151 (Ex. 35); Letter from George A. H. Fraser to Attorney General, at 3 (Feb. 27, 1926), reprinted in 2 Kelly 164 (Ex. 39). See also App. to Brief for Petitioner 3a–4a. Today the Court rejects both of these interpretations *sub silentio*, adopting instead a novel interpretation of the first clause of § 17 that *no one* has ever followed. *Ante*, at 252–253. The Court's principle of deference to a prior administrative construction therefore appears to be that such deference is appropriate only to the extent that the prior construction accords with the Court's desired interpretation.

legislative history, the canons of construction that this Court has followed since early in the 19th century nevertheless should compel its rejection given that other interpretations of § 17 more faithfully hew to the terms of the Nonintercourse Act. The Constitution grants Congress—not this Court—the power to set national policy respecting Indian lands,[62] and since the 19th century the cornerstone of Congress' policy has been to impose strict restraints on alienation of Indian title—a policy grounded on the federal trust responsibility toward Indian tribes.[63] In accordance with general fiduciary principles, departures from this policy against alienation are not to be "lightly implied." *United States ex rel. Hualpai Indians* v. *Santa Fe Pacific R. Co.*, 314 U. S. 339, 354 (1941). Ambiguous language in Indian statutes therefore always has been construed in favor of restrictions on alienation. See, *e. g.*, *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U. S. 649, 656 (1976); *Starr* v. *Long Jim*, 227 U. S. 613, 622–623 (1913). Congressional intent to authorize the extinguishment of Indian title must be "plain and unambiguous," *United States ex rel. Hualpai Indians* v. *Santa Fe Pacific R. Co.*, *supra*, at 346—that is, it either "must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history," *Mattz* v. *Arnett*, 412 U. S. 481, 505 (1973) (termination of reservation).[64] Just this

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[62] U. S. Const., Art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes . . . ." The authority to control tribal property is "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs." *Delaware Tribal Business Committee* v. *Weeks*, 430 U. S. 73, 86 (1977).

[63] See, *e. g.*, *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 247–248 (1985); *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U. S., at 667–670; *United States* v. *Creek Nation*, 295 U. S. 103, 109–111 (1935); *Cherokee Nation* v. *Georgia*, 5 Pet., at 17; *Johnson and Graham's Lessee* v. *McIntosh*, 8 Wheat. 543, 591, 604 (1823). See generally Cohen 220–228, 508–528.

[64] See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979); *Bryan* v. *Itasca County*,

Term, we followed these principles in concluding that various congressional enactments had neither authorized nor ratified sales of land by the Oneida Indian Nation of New York; the congressional language, we found, "far from demonstrates a plain and unambiguous intent to extinguish Indian title." *County of Oneida* v. *Oneida Indian Nation of New York*, 470 U. S. 226, 248 (1985). Cf. *Montana* v. *Blackfeet Tribe of Indians*, 471 U. S. 759, 765–766 (1985) (state taxation of Indian lands).

Section 17's "puzz[ling]" language, *ante*, at 253, n. 27, can hardly be characterized as a "plain and unambiguous" statement of congressional intent to enable the Pueblos, unlike any other Indian tribe holding unallotted lands, to alienate their property. The language itself is phrased entirely in the negative ("*No* right, title or interest shall . . . be acquired . . . *and no* sale, grant, lease . . . . shall be of any validity" (emphasis added)), and is more plausibly read as simply declaratory of restraints already in effect. See *supra*, at 261–262. When Congress intends affirmatively to authorize Indian tribes or the Secretary to convey interests in Indian lands, it consistently has done so in clear, express language (*e. g.*, "[t]he Secretary . . . is authorized to grant permission"; "restricted Indian lands . . . may be leased by the Indian owners").[65] Congress therefore was "fully aware of the means" by which alienation could have been authorized, *Mattz* v. *Arnett*, *supra*, at 504, and not to employ those means in § 17. Moreover, if § 17 was intended to have the broad operative significance that the Court unearths, it is curious why Congress never

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426 U. S. 373, 392 (1976); *Menominee Tribe* v. *United States*, 391 U. S. 404, 412–413 (1968); *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918).

[65] See, *e. g.*, 25 U. S. C. §§ 311–312, 319–321, 322a, 323, 350, 352, 352a, 352b, 373, 373a, 373b, 378–380, 391a, 392–393, 393a, 394–396, 396a, 396e, 396g, 397–398, 398a, 398e, 399–400, 400a, 401–402, 402a, 403, 403a, 403a–1, 403a–2, 403b, 404–409, 409a, 415, 415a, 416, 416c, 463e, 464, 483, 483a, 487, 564c, 564g, 564w–1(b), (e), 564w–2, 574, 593, 608, 610, 610a, 610c, 622, 635, 677h, 677*o*, 721, 745–746, 953, 958, 973–974.

has seen fit to have it codified in Title 25 of the United States Code. For these reasons, and because the Court's contrary interpretation so clearly flouts the structure of the Pueblo Lands Act, the legislative history, and the significance of subsequent legislation, I must conclude that § 17 can only be read as having attempted to set forth a broad declaratory reaffirmation of the Nonintercourse Act as Congress believed that Act applied to the Pueblos.[66]

It might be argued, however, that the Court's construction treats the Pueblos with a greater degree of respect by giving them broader automony in disposing of tribal lands, and that a contrary reading simply reflects a view that the Pueblos are somehow incapable of managing their own affairs. There is no question that the federal policy against alienation at one time embodied paternalistic notions of "protecting Indians from their own improvidence."[67] But the federal policy now rests on much different grounds. Congress' policy reflects its determination that restraints on alienation are necessary to "insulate Indian lands from the full impact of market forces" and thereby to preserve "a substantial tribal land base [that is] essential to the existence of tribal society and

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[66] The Court's interpretation stands in violation of other canons of construction as well. Under the interpretation I suggest, Pueblo conveyancing is subject to the full range of procedural and financial safeguards set forth in the statutes governing such conveyances by Indian tribes generally. Under the Court's interpretation, Pueblo conveyancing is not. Yet it is well established that, when faced with two such conflicting interpretations, courts must resolve ambiguities in favor of preserving Indian rights and safeguards—a course dictated by "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation* v. *United States*, 316 U. S. 286, 296 (1942). See *United States* v. *Mitchell*, 463 U. S., at 225; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973); *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 431–432 (1943); *Carpenter* v. *Shaw*, 280 U. S. 363, 367 (1930). See generally Cohen 221–225.

[67] *Id.*, at 509.

culture."[68] As the respondent Pueblo of Santa Ana has argued:

> "There is no inconsistency in the Pueblos wanting to insure the applicability to their lands of the full array of federal restrictions on alienation. Like other tribes, the Pueblos as communities take the long view in wanting to preserve their homelands. Bitter experience prior to the Pueblo Lands Act, and even more recently . . . has shown that tribal councils can be induced to agree to unwise conveyances. A single such transaction could cause the total loss of the land base, and the ultimate disappearance of the tribal entity. Reposing an unconditioned, delegable power of approval in the Secretary, moreover, may not provide adequate protection against improvident transactions. . . . Characteristically, it is non-Indian entities such as Petitioner and *amici* who argue for 'emancipation' of the Pueblos."[69]

The federal policy against alienation, and this Court's long-standing canons of construction deferring to that policy, may or may not ultimately be sound. But that is a question for Congress, and it is not for this Court to indulge in unsupportable statutory analysis simply to further its own views on the proper management of Indian affairs.[70]

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[68] *Ibid.* "The continued enforcement of federal restrictions, in this view, derives not from a perceived incompetence of the 'ward,' but from a perceived value in the desirability of a separate Indian culture and polity." *Id.*, at 510. See also S. Rep. No. 93–604 (1973) (*re* Menominee Tribe).

[69] Brief for Respondent 29, n. 25. See also Chambers & Price, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan. L. Rev. 1061 (1974).

[70] The Court repeatedly tries to justify its decision by reference to the so-called "unique status" and "unique and 'interesting history of the Pueblo Indians.'" *Ante*, at 240, 242; see also *ante*, at 251. Yet Congress' consistent judgment—to which some deference is due—has since 1851 been that the Pueblo Tribes should be in "the same position . . . as other federally recognized Indian tribes." H. R. Conf. Rep. 94–1439, at 4. Simi-

III

As it came to us on petition for a writ of certiorari, this case involved an obscure statute that related only to the 19 Pueblo Tribes in New Mexico. With but one or two exceptions, it never had been used to sanction outright alienation of tribal lands, see n. 60, *supra*, and it had been used to convey lesser interests approximately 80 times in its 60-year history. Moreover, the statute had fallen into virtually complete disuse and oblivion for the last two generations. We also were advised that the question presented—however important to the individual Tribes and companies involved—nevertheless implicated little more than a handful of easements.[71] And, we were advised, most of those easements already had been renegotiated (under the general provisions, not § 17).[72]

In addition, the District Court for the District of New Mexico and the Court of Appeals for the Tenth Circuit had both concluded that petitioner's proffered construction of § 17 did not accord with the well-settled status of the Pueblo Tribes.[73] Those courts, by virtue of their geographic position, have essentially exercised exclusive jurisdiction over federal questions pertaining to the Pueblos since New Mexico statehood. As a result of their continuing exposure to cases involving the Pueblos, these courts have been in the best position to understand "the unique and 'interesting history of the Pueblo Indians,'" *ante*, at 240, and to evaluate at close

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larly, with the exception of the *Joseph* decision this Court consistently has held that notwithstanding any differences in history or lifestyle the Pueblos have the *identical* status as other Indian tribes under the Nonintercourse Act. See, *e. g.*, *United States* v. *Chavez*, 290 U. S., at 361–365; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S., at 320–321; *United States* v. *Candelaria*, 271 U. S., at 439–443; *United States* v. *Sandoval*, 231 U. S. 28, 45–48 (1913).

[71] Brief in Opposition 6, 24–25.

[72] *Id.*, at 24–25; see also Brief for Respondent 2–3; Tr. of Oral Arg. 32–33.

[73] See App. 86–92; 734 F. 2d 1402, 1404–1407 (1984).

range the relationship between the Pueblo Tribes and the Federal Government. With the exception of several procedural dismissals of quiet title actions in the 1920's,[74] these courts over the last 60 years have consistently held that Pueblo lands are *fully* governed by the Nonintercourse Act and that such lands are inalienable without explicit congressional authorization.[75] They also have consistently held that

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[74] The Court argues that the District Court in the 1920's "placed a stamp of approval on this transaction and numerous others," and that these actions are "'entitled to very great respect.'" *Ante*, at 254. However, with apparently only two exceptions, the District Court's "approval[s]" consisted simply of granting motions by the Government (acting as guardian for the Pueblos) to dismiss certain quiet title actions *before* the defendants had even answered the complaints. These dismissals were not on the merits and the validity of § 17 conveyancing had not been contested, and they therefore cannot be relied upon as authority for the Court's decision. See *Oklahoma* v. *Texas*, 272 U. S. 21, 42–43 (1926); *Vicksburg* v. *Henson*, 231 U. S. 259, 269, 273 (1913).

The District Court did, however, enter final decrees in two quiet title suits that sanctioned the use of § 17. See *United States as Guardian of the Pueblo of Acoma* v. *Arvizo*, Equity No. 2079 (May 14, 1931); *United States as Guardian of the Pueblo of Laguna* v. *Armigo*, Equity No. 2080 (Nov. 2, 1931). The record shows that the defendant railroad in both cases did *not* negotiate new right-of-way agreements with the Pueblos, but simply gathered the old deeds dating back to the 1880's *and successfully submitted them to the Secretary for retroactive validation* without Pueblo approval and without the payment of any new compensation. See 1 Kelly 39–40; 2 *id.*, at 301–313 (Exs. 101–106). As one historian has suggested, "[f]ortunately for the viability of the Pueblo Lands Act, such action was not liberally indulged, otherwise there would have been little reason for the rest of the Act. The Secretary could simply have ratified all of the old deeds by which non-Indians took possession of Pueblo lands." 1 *id.*, at 40–41.

[75] See, *e. g.*, *United States* v. *University of New Mexico*, 731 F. 2d 703, 706 (CA10), cert. denied, 469 U. S. 853 (1984); *Plains Electric Generation & Transmission Cooperative, Inc.* v. *Pueblo of Laguna*, 542 F. 2d 1375, 1376–1377 (CA10 1976); *New Mexico* v. *Aamodt*, 537 F. 2d 1102, 1109, 1111 (CA10 1976), cert. denied, 429 U. S. 1121 (1977); *Alonzo* v. *United States*, 249 F. 2d 189, 194–196 (CA10 1957), cert. denied, 355 U. S. 940 (1958); *Garcia* v. *United States*, 43 F. 2d 873, 878 (CA10 1930); *United States* v. *Board of National Missions of Presbyterian Church*, 37 F. 2d 272, 274 (CA10 1929).

§ 17 in no way authorizes alienation of Pueblo lands.[76] The decisions below were merely the most recent applications of this settled law. And this settled law not only did not conflict with decisions of this Court, but followed directly from them.[77]

Notwithstanding all of these considerations, the Court granted certiorari[78] and today holds that the Pueblos are not

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[76] See, *e. g.*, *United States* v. *University of New Mexico*, *supra*, at 706 (§ 17 merely "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act"); *Alonzo* v. *United States*, *supra*, at 195–196 (§ 17 merely "insured that the restrictions implicit in the decision in United States v. Sandoval . . . would continue in force"; it "insured that the restrictions which Congress recognized as theretofore existing, with respect to lands owned and possessed by the New Mexico Pueblos, as a community, should continue, except in cases where the Pueblos' title had been extinguished, as provided for in such Act").

The Court's purported concern for deferring to "individuals [who] were far more likely to have had an understanding of the actual intent of Congress," *ante*, at 254–255, might have been better directed to the panel that decided *Alonzo*. Chief Judge Bratton was a former United States Senator from New Mexico and had sponsored the 1928 Pueblo right-of-way legislation, see n. 19, *supra*, and the 1933 amendment to § 16 of the Pueblo Lands Act, see n. 20, *supra*. Judge Phillips had been one of the two District Court judges who heard the quiet title suits under the Pueblo Lands Act. Judge Breitenstein, the third panel member, authored the opinion below in the instant case.

[77] See, *e. g.*, *United States* v. *Chavez*, *supra*, at 362–365; *Pueblo of Santa Rosa* v. *Fall*, 273 U. S., at 320–321 (Nonintercourse Act "appl[ies] here whether the Indians concerned are to be classified as nomadic or Pueblo Indians. . . . None of [its] requirements can be dispensed with, and it does not appear that in respect of most of them there was even an attempt to comply"); *United States* v. *Candelaria*, *supra*, at 441 ("While there is no express reference in the [Nonintercourse Act] to Pueblo Indians, . . . it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians' "); *United States* v. *Sandoval*, *supra*, at 45–49.

[78] But see this Court's Rules 17.1(a) and (c) (discretionary grant of certiorari appropriate where, *inter alia*, decision below "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," "has decided an important ques-

subject to the terms of the Nonintercourse Act and that, under § 17, they may instead "convey good title to [their] lands with the approval of the Secretary of the Interior." *Ante*, at 247. The Court, ironically, has thus come full circle. In *United States* v. *Joseph*, 94 U. S. 614 (1877), the Court exempted the Pueblos from the Nonintercourse Act. As the Court subsequently conceded, that decision rested on assumptions "at variance with other recognized sources of information . . . and with the long-continued action of the legislative and executive departments." *United States* v. *Sandoval*, 231 U. S., at 49. Congress was required to enact the Pueblo Lands Act to resolve the morass that the Court's uninformed and improvident decision in *Joseph* had created. Today, in its first and probably last direct encounter with the Act, the Court once again renders an uninformed, improvident, and sweeping opinion that is "at variance . . . with the long-continued action of the legislative and executive departments." *United States* v. *Sandoval*, *supra*, at 49. And, once again, Congress most likely will be forced to step in and clean up after the Court's handiwork.

I dissent.

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tion of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." See also Estreicher & Sexton, New York University Supreme Court Project 14–15 (1984) (executive summary) (to be published in 59 N. Y. U. L. Rev. 677, 717–718 (1984) (footnotes omitted)) ("The Court can, and should, establish and police a framework for the delegation and exercise of responsibility to and by lower courts. Except in relatively rare situations justifying immediate intervention, the Court as manager would accord a presumption of regularity and validity to the decisions of state and lower federal courts. A wise manager delegates responsibilities to subordinates and, absent an indication that something is awry, accords their decisions a presumption of validity. To do otherwise is to denigrate the authority of subordinate actors, thereby diminishing their own sense of responsibility and ultimately increasing the manager's tasks as well as the overall workload").

NORTHWEST WHOLESALE STATIONERS, INC. *v.* PACIFIC STATIONERY & PRINTING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1368. Argued February 19, 1985—Decided June 11, 1985

Petitioner is a wholesale purchasing cooperative whose membership consists of office supply retailers in the Pacific Northwest States. Nonmember retailers can purchase supplies from petitioner at the same price as members, but since petitioner annually distributes its profits to members in the form of a percentage rebate, members effectively purchase supplies at a lower price than do nonmembers. Petitioner expelled respondent from membership without any explanation, notice, or hearing. Thereafter, respondent brought suit in Federal District Court, alleging that the expulsion without procedural protections was a group boycott that limited its ability to compete and should be considered *per se* violative of § 1 of the Sherman Act. On cross-motions for summary judgment, the District Court rejected application of the *per se* rule and held instead that rule-of-reason analysis should govern the case. Finding no anticompetitive effect on the basis of the record, the court granted summary judgment for petitioner. The Court of Appeals reversed, holding that although § 4 of the Robinson-Patman Act expressly approves price discrimination occasioned by such an expulsion as the one in question and thus provides a mandate for self-regulation, nevertheless, because petitioner had not provided any procedural safeguards, the expulsion of respondent was not shielded by § 4 and therefore constituted a *per se* group boycott in violation of § 1 of the Sherman Act.

Held: Petitioner's expulsion of respondent does not fall within the category of activity that is conclusively presumed to be anticompetitive so as to mandate *per se* invalidation under § 1 of the Sherman Act as a group boycott or concerted refusal to deal. Pp. 289–298.

(a) Section 4 of the Robinson-Patman Act, which is no more than a narrow immunity from the price discrimination prohibitions of that Act, cannot properly be construed as an exemption from or repeal of any portion of the Sherman Act or as a broad mandate for industry self-regulation. *Silver* v. *New York Stock Exchange*, 373 U. S. 341, distinguished. In any event, the absence of procedural safeguards in this case can in no sense determine the antitrust analysis, since if the challenged expulsion amounted to a *per se* violation of § 1, no amount of procedural protection would save it, whereas if the expulsion did not amount to a

violation of § 1, no lack of procedural protections would convert it into a *per se* violation. Pp. 291–293.

(b) The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus so as to raise a probability of anticompetitive effect. Unless it is shown that the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis. Here, respondent, focusing on the argument that the lack of procedural safeguards required *per se* liability, made no such showing. But because the Court of Appeals applied an erroneous *per se* analysis, it never evaluated the District Court's rule-of-reason analysis rejecting respondent's claim, and therefore a remand is appropriate to permit appellate review of that determination. Pp. 293–298.

715 F. 2d 1393, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which all other Members joined except MARSHALL and POWELL, JJ., who took no part in the decision of the case.

David J. Sweeney argued the cause for petitioner. With him on the briefs were *Douglas R. Grim* and *Mark B. Weintraub.*

Catherine G. O'Sullivan argued the cause for the United States as *amicus curiae* urging reversal. With her on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Rule,* and *Edward T. Hand.*

Joseph P. Bauer argued the cause for respondent. With him on the brief was *Robert R. Carney.**

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires that we decide whether a *per se* violation of § 1 of the Sherman Act, 15 U. S. C. § 1, occurs when a cooperative buying agency comprising various retailers expels a member without providing any procedural means for

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**Ira S. Sacks* filed a brief for Indian Head Inc. as *amicus curiae* urging affirmance.

challenging the expulsion.[1] The case also raises broader questions as to when *per se* antitrust analysis is appropriately applied to joint activity that is susceptible of being characterized as a concerted refusal to deal.

I

Because the District Court ruled on cross-motions for summary judgment after only limited discovery, this case comes to us on a sparse record. Certain background facts are undisputed. Petitioner Northwest Wholesale Stationers is a purchasing cooperative made up of approximately 100 office supply retailers in the Pacific Northwest States. The cooperative acts as the primary wholesaler for the retailers. Retailers that are not members of the cooperative can purchase wholesale supplies from Northwest at the same price as members. At the end of each year, however, Northwest distributes its profits to members in the form of a percentage rebate on purchases. Members therefore effectively purchase supplies at a price significantly lower than do nonmembers.[2] Northwest also provides certain warehousing facilities. The cooperative arrangement thus permits the participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be

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[1] That section reads in relevant part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[2] Although this patronage rebate policy is a form of price discrimination, § 4 of the Robinson-Patman Act specifically sanctions such activity by cooperatives:

"Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." 49 Stat. 1528, 15 U. S. C. § 13b.

A relevant state-law provision provides analogous protection. Ore. Rev. Stat. § 646.030 (1983).

unavailable to them. In fiscal 1978 Northwest had $5.8 million in sales. App. 73.

Respondent Pacific Stationery & Printing Co. sells office supplies at both the retail and wholesale levels. Its total sales in fiscal 1978 were approximately $7.6 million; the record does not indicate what percentage of revenue is attributable to retail and what percentage is attributable to wholesale. Pacific became a member of Northwest in 1958. In 1974 Northwest amended its bylaws to prohibit members from engaging in both retail and wholesale operations. See *id.*, at 50, 59. A grandfather clause preserved Pacific's membership rights. See *id.*, at 59. In 1977 ownership of a controlling share of the stock of Pacific changed hands, *id.*, at 70, and the new owners did not officially bring this change to the attention of the directors of Northwest. This failure to notify apparently violated another of Northwest's bylaws. See *id.*, at 59 (Bylaws, Art. VIII, § 5).

In 1978 the membership of Northwest voted to expel Pacific. Most factual matters relevant to the expulsion are in dispute. No explanation for the expulsion was advanced at the time, and Pacific was given neither notice, a hearing, nor any other opportunity to challenge the decision. Pacific argues that the expulsion resulted from Pacific's decision to maintain a wholesale operation. See Brief in Opposition 11. Northwest contends that the expulsion resulted from Pacific's failure to notify the cooperative members of the change in stock ownership. See Pet. for Cert. 8. The minutes of the meeting of Northwest's directors do not definitively indicate the motive for the expulsion. App. 75–77. It is undisputed that Pacific received approximately $10,000 in rebates from Northwest in 1978, Pacific's last year of membership. Beyond a possible inference of loss from this fact, however, the record is devoid of allegations indicating the nature and extent of competitive injury the expulsion caused Pacific to suffer.

Pacific brought suit in 1980 in the United States District Court for the District of Oregon alleging a violation of § 1 of the Sherman Act. The gravamen of the action was that Northwest's expulsion of Pacific from the cooperative without procedural protections was a group boycott that limited Pacific's ability to compete and should be considered *per se* violative of § 1. See Complaint ¶ 8, App. 4–5. On cross-motions for summary judgment the District Court rejected application of the *per se* rule and held instead that rule-of-reason analysis should govern the case. Finding no anticompetitive effect on the basis of the record as presented, the court granted summary judgment for Northwest. See App. to Pet. for Cert. 22–24.

The Court of Appeals for the Ninth Circuit reversed, holding "that the uncontroverted facts of this case support a finding of *per se* liability." 715 F. 2d 1393, 1395 (1983). The court reasoned that the cooperative's expulsion of Pacific was an anticompetitive concerted refusal to deal with Pacific on equal footing, which would be a *per se* violation of § 1 in the absence of any specific legislative mandate for self-regulation sanctioning the expulsion. The court noted that § 4 of the Robinson-Patman Act, 15 U. S. C. § 13b, specifically approves the price discrimination occasioned by such expulsion and concluded that § 4 therefore provided a mandate for self-regulation. Such a legislative mandate, according to the court, would ordinarily result in evaluation of the challenged practice under the rule of reason. But, drawing on *Silver* v. *New York Stock Exchange*, 373 U. S. 341, 348–349 (1963), the court decided that rule-of-reason analysis was appropriate only on the condition that the cooperative had provided procedural safeguards sufficient to prevent arbitrary expulsion and to furnish a basis for judicial review. Because Northwest had not provided any procedural safeguards, the court held that the expulsion of Pacific was not shielded by Robinson-Patman immunity and therefore consti-

tuted a *per se* group boycott in violation of § 1 of the Sherman Act. 715 F. 2d, at 1395–1398.

We granted certiorari to examine this application of *Silver* v. *New York Stock Exchange*, *supra*, in an area of antitrust law that has not been free of confusion.[3] 469 U. S. 814 (1984). We reverse.

II

The decision of the cooperative members to expel Pacific was certainly a restraint of trade in the sense that every commercial agreement restrains trade. *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238 (1918). Whether this action violates § 1 of the Sherman Act depends on whether it is adjudged an *unreasonable* restraint. *Ibid.* Rule-of-reason analysis guides the inquiry, see *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911), unless the challenged action falls into the category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5 (1958).

This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive. Courts can thereby avoid the "significant costs" in "business certainty and litigation efficiency" that a full-fledged rule-of-reason inquiry entails. *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 343–344 (1982). See also *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 609–610 (1972). The decision to apply the *per se* rule turns on "whether the practice facially appears to be one that would always or almost always tend to restrict

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[3] See L. Sullivan, Law of Antitrust 229–230 (1977); Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination, 79 Colum. L. Rev. 685 (1979).

competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 19–20 (1979) (citations omitted). See also *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma*, 468 U. S. 85, 103–104 (1984) ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct").

This Court has long held that certain concerted refusals to deal or group boycotts are so likely to restrict competition without any offsetting efficiency gains that they should be condemned as *per se* violations of § 1 of the Sherman Act. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959); *United States* v. *General Motors Corp.*, 384 U. S. 127 (1966); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961); *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941); *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 234 U. S. 600 (1914). The question presented in this case is whether Northwest's decision to expel Pacific should fall within this category of activity that is conclusively presumed to be anticompetitive.[4] The Court of Appeals held that the exclusion of Pacific from the cooperative should conclusively be presumed unreasonable on the ground that Northwest provided no procedural protections to Pacific. Even if the lack of procedural protections does not justify a conclusive presumption of predominantly anticompetitive effect, the mere act of expulsion of a competitor from a wholesale cooperative might be argued to be sufficiently likely to have such effects under

[4] Northwest raises no challenge before this Court to the conclusion of the Court of Appeals that the cooperative's decision to expel Pacific was a "combination or conspiracy" affecting interstate commerce within the meaning of § 1 of the Sherman Act.

the present circumstances and therefore to justify application of the *per se* rule. These possibilities will be analyzed separately.

A

The Court of Appeals drew from *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963), a broad rule that the conduct of a cooperative venture—including a concerted refusal to deal—undertaken pursuant to a legislative mandate for self-regulation is immune from *per se* scrutiny and subject to rule-of-reason analysis only if adequate procedural safeguards accompany self-regulation. We disagree and conclude that the approach of the Court in *Silver* has no proper application to the present controversy.

The Court in *Silver* framed the issue as follows:

> "[W]hether the New York Stock Exchange is to be held liable to a nonmember broker-dealer under the antitrust laws or regarded as impliedly immune therefrom when, pursuant to rules the Exchange has adopted under the Securities Exchange Act of 1934, it orders a number of its members to remove private direct telephone wire connections previously in operation between their offices and those of the nonmember, without giving the nonmember notice, assigning him any reason for the action, or affording him an opportunity to be heard." *Id.*, at 343.

Because the New York Stock Exchange occupied such a dominant position in the securities trading markets that the boycott would devastate the nonmember, the Court concluded that the refusal to deal with the nonmember would amount to a *per se* violation of § 1 unless the Securities Exchange Act provided an immunity. *Id.*, at 347–348. The question for the Court thus was whether effectuation of the policies of the Securities Exchange Act required partial repeal of the Sherman Act insofar as it proscribed this aspect of exchange self-regulation.

Finding exchange self-regulation—including the power to expel members and limit dealings with nonmembers—to be an essential policy of the Securities Exchange Act, the Court held that the Sherman Act should be construed as having been partially repealed to permit the type of exchange activity at issue. But the interpretive maxim disfavoring repeals by implication led the Court to narrow permissible self-policing to situations in which adequate procedural safeguards had been provided.

> "Congress . . . cannot be thought to have sanctioned and protected self-regulative activity when carried out in a fundamentally unfair manner. The point is not that the antitrust laws impose the requirement of notice and a hearing here, but rather that, in acting without according petitioners these safeguards in response to their request, the Exchange has plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation." *Id.*, at 364 (footnote omitted).

Thus it was the specific need to accommodate the important national policy of promoting effective exchange self-regulation, tempered by the principle that the Sherman Act should be narrowed only to the extent necessary to effectuate that policy, that dictated the result in *Silver*.

Section 4 of the Robinson-Patman Act is not comparable to the self-policing provisions of the Securities Exchange Act. That section is no more than a narrow immunity from the price discrimination prohibitions of the Robinson-Patman Act itself. The Conference Report makes clear that the exception was intended solely to "safeguard producer and consumer cooperatives against any charge of violation of the act *based on their distribution of earnings or surplus among their members on a patronage basis.*" H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., 9 (1936) (emphasis added). This section has never been construed as granting cooperatives a blanket exception from the Robinson-Patman Act and cannot plausibly be construed as an exemption to or

repeal of any portion of the Sherman Act.[5] "There is nothing in the last section of the bill [containing § 4] that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others." 80 Cong. Rec. 9419 (1936) (remarks of Rep. Utterback).

In light of this circumscribed congressional intent, there can be no argument that § 4 of the Robinson-Patman Act should be viewed as a broad mandate for industry self-regulation. No need exists, therefore, to narrow the Sherman Act in order to accommodate any competing congressional policy requiring discretionary self-policing. Indeed, Congress would appear to have taken some care to make clear that no constriction of the Sherman Act was intended. In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.

B

This case therefore turns not on the lack of procedural protections but on whether the decision to expel Pacific is properly viewed as a group boycott or concerted refusal to deal mandating *per se* invalidation. "Group boycotts" are often listed among the classes of economic activity that merit *per se* invalidation under § 1. See *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S., at 212; *Northern Pacific R. Co.* v. *United States*, 356 U. S., at 5; *Silver* v. *New York Stock Exchange*, 373 U. S., at 348; *White Motor Co.* v. *United*

[5] See, *e. g.*, *American Motor Specialties Co.* v. *FTC*, 278 F. 2d 225, 229 (CA2), cert. denied, 364 U. S. 884 (1960).

States, 372 U. S. 253, 259–260 (1963). Exactly what types of activity fall within the forbidden category is, however, far from certain. "[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine." L. Sullivan, Law of Antitrust 229–230 (1977). Some care is therefore necessary in defining the category of concerted refusals to deal that mandate *per se* condemnation. See *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531, 543 (1978) (concerted refusals to deal "are not a unitary phenomenon"). Cf. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S., at 9.

Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." Sullivan, *supra*, at 261–262. See, *e. g.*, *Silver*, *supra* (denial of necessary access to exchange members); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U. S. 656 (1961) (denial of necessary certification of product); *Associated Press* v. *United States*, 326 U. S. 1 (1945) (denial of important sources of news); *Klor's, Inc.*, *supra* (denial of wholesale supplies). In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, *Silver*, *supra*; *Radiant Burners, Inc.*, *supra*, and frequently the boycotting firms possessed a dominant position in the relevant market. *E. g.*, *Silver*, *supra*; *Associated Press*, *supra*; *Fashion Originators' Guild of America, Inc.* v. *FTC*, 312 U. S. 457 (1941). See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1533, 1563–1565 (1982). In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.

Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences. For example, we recognized last Term in *National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma* that *per se* treatment of the NCAA's restrictions on the marketing of televised college football was inappropriate—despite the obvious restraint on output—because the "case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U. S., at 101.

Wholesale purchasing cooperatives such as Northwest are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects. Rather, such cooperative arrangements would seem to be "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc., supra,* at 20. The arrangement permits the participating retailers to achieve economies of scale in both the purchase and warehousing of wholesale supplies, and also ensures ready access to a stock of goods that might otherwise be unavailable on short notice. The cost savings and order-filling guarantees enable smaller retailers to reduce prices and maintain their retail stock so as to compete more effectively with larger retailers.

Pacific, of course, does not object to the existence of the cooperative arrangement, but rather raises an antitrust challenge to Northwest's decision to bar Pacific from continued membership.[6] It is therefore the action of expulsion that

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[6] Because Pacific has not been wholly excluded from access to Northwest's wholesale operations, there is perhaps some question whether the challenged activity is properly characterized as a concerted refusal to deal. To be precise, Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se*

must be evaluated to determine whether *per se* treatment is appropriate. The act of expulsion from a wholesale cooperative does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect. See *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, at 9. Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. Disclosure rules, such as the one on which Northwest relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members.[7] Nor would the expulsion characteristically be likely to result in predominantly anticompetitive effects, at least in the type of situation this case presents. Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted. See L. Sullivan, Law of Antitrust 292–293 (1977); Brodley, 95 Harv. L. Rev., at 1563–1565. Cf. *Jefferson Parish Hospital Dist.* v. *Hyde*, 466 U. S. 2, 12–15 (1984) (absent indication of market power, tying arrangement does not warrant *per se* invalidation). See generally *National*

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invalidation if it placed a competing firm at a severe competitive disadvantage. See generally Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1532 (1982) ("Even if the joint venture does deal with outside firms, it may place them at a severe competitive disadvantage by treating them less favorably than it treats the [participants in the joint venture]").

[7] Pacific argues, however, that this justification for expulsion was a pretext because the members of Northwest were fully aware of the change in ownership despite lack of formal notice. According to Pacific, Northwest's motive in the expulsion was to place Pacific at a competitive disadvantage to retaliate for Pacific's decision to engage in an independent wholesale operation. Such a motive might be more troubling. If Northwest's action were not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices, an inference of anticompetitive animus might be appropriate. But such an argument is appropriately evaluated under the rule-of-reason analysis.

Collegiate Athletic Assn. v. *Board of Regents of University of Oklahoma*, 468 U. S., at 104, n. 26 ("*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct"). Absent such a showing with respect to a cooperative buying arrangement, courts should apply a rule-of-reason analysis. At no time has Pacific made a threshold showing that these structural characteristics are present in this case. See Complaint, App. 2; Motion for Partial Summary Judgment, App. 9.[8]

The District Court appears to have followed the correct path of analysis—recognizing that not all concerted refusals to deal should be accorded *per se* treatment and deciding this one should not.[9] The foregoing discussion suggests, however, that a satisfactory threshold determination whether anticompetitive effects would be likely might require a more detailed factual picture of market structure than the District

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[8] Given the state of this record it is difficult to understand how the Court of Appeals could have concluded that Pacific "loses the ability to use Northwest's superior warehousing and expedited order-filling facilities, as well as any competitive advantages that may flow simply from being known in the industry as a member of an established cooperative." 715 F. 2d 1393, 1395 (1983). The District Court had specifically found no anticompetitive effect.

[9] The District Court stated:

"I think that in a case of this nature, in order to move an antitrust violation, it is necessary to show some restraint of competition, and I don't believe that is shown here. Even if it is a group boycott, I still believe under [*Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (CA9 1969), and *Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F. 2d 1376 (CA9 1981)], that the Rule of Reason operates. And I think if you apply the Rule of Reason to the facts that are submitted by the parties here that are not disputed in this case, you come to the conclusion that there is *[sic]* simply been no showing by the Plaintiff in this case of a restraint of competition as distinguished from possible damage to the Plaintiff by being expelled from the association." App. to Pet. for Cert. 23–24.

Court had before it. Nonetheless, in our judgment the District Court's rejection of *per se* analysis in this case was correct. A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive. When the plaintiff challenges expulsion from a joint buying cooperative, some showing must be made that the cooperative possesses market power or unique access to a business element necessary for effective competition. Focusing on the argument that the lack of procedural safeguards required *per se* liability, Pacific did not allege any such facts. Because the Court of Appeals applied an erroneous *per se* analysis in this case, the court never evaluated the District Court's rule-of-reason analysis rejecting Pacific's claim. A remand is therefore appropriate for the limited purpose of permitting appellate review of that determination.

III

"The *per se* rule is a valid and useful tool of antitrust policy and enforcement." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U. S., at 8. It does not denigrate the *per se* approach to suggest care in application. In this case, the Court of Appeals failed to exercise the requisite care and applied *per se* analysis inappropriately. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE MARSHALL and JUSTICE POWELL took no part in the decision of this case.

BATEMAN EICHLER, HILL RICHARDS, INC. *v.* BERNER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–679. Argued April 15, 1985—Decided June 11, 1985

Respondent investors (hereafter respondents) filed a damages action in Federal District Court, alleging that they incurred substantial trading losses after a securities broker (employed by petitioner) and the officer of a corporation fraudulently induced respondents to purchase stock in the corporation by divulging false and materially incomplete information about the corporation on the pretext that it was accurate inside information. Respondents contended that this alleged scheme violated, *inter alia*, § 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b–5 promulgated thereunder. The District Court dismissed the complaint on the ground that, because respondents themselves had violated the same laws under which recovery was sought by trading on what they believed was inside information, they were *in pari delicto* with the broker and corporate insider and thus were barred from recovery. The Court of Appeals reversed.

Held: There is no basis at this stage of the litigation for applying the *in pari delicto* defense to bar respondents' action. Pp. 306–319.

(a) An implied private damages action under the federal securities laws may be barred on the grounds of the plaintiff's own culpability only where (i) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks to redress, and (ii) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public. Cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134. Pp. 306–311.

(b) Because a tippee's duty to disclose material nonpublic information typically is derivative from the insider-tipper's duty, the tippee in these circumstances cannot be said to be as culpable as the tipper whose breach of duty gave rise to the tippee's liability in the first place. Moreover, insiders and broker-dealers who selectively disclose material nonpublic information about the issuer commit a potentially broader range of violations than do tippees who trade on the basis of that information. Absent other culpable actions by a tippee that can fairly be said to outweigh these violations by insiders and broker-dealers, the tippee cannot

properly be characterized as being of substantially equal culpability as his tippers. Pp. 311–314.

(c) Denying the *in pari delicto* defense in such circumstances will best promote protection of the investing public and the national economy. First, allowing a defrauded tippee to bring suit against his defrauding tipper promotes the important goal of exposing wrongdoers and rendering them more easily subject to civil, administrative, and criminal penalties. Second, deterrence of insider trading most frequently will be maximized by bringing enforcement pressures to bear on the sources of such information—corporate insiders and broker-dealers. Third, insiders and broker-dealers will in many circumstances be more responsive to the deterrent pressures of potential sanctions. Finally, there are means other than the *in pari delicto* defense to deter tippee trading. Although there might well be situations in which the relative culpabilities of tippees and their sources merit a different mix of deterrent incentives, in cases such as the instant one the public interest will most frequently be advanced if defrauded tippees are permitted to bring suit and to expose illegal practices by corporate insiders and broker-dealers to full public view for appropriate sanctions. Pp. 315–319.

730 F. 2d 1319, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BURGER, C. J., concurred in the judgment. MARSHALL, J., took no part in the decision of the case.

Robert S. Warren argued the cause for petitioner. With him on the briefs were *Phillip L. Bosl* and *Gail Ellen Lees*.

Geoffrey P. Knudsen argued the cause for respondents Berner et al. With him on the brief was *John H. Boone*.

Bruce N. Kuhlik argued the cause *pro hac vice* for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Claiborne, Daniel L. Goelzer, Paul Gonson, Jacob H. Stillman, and Larry R. Lavoie.**

**Edward H. Fleischman, Martin P. Unger, Catherine A. Ludden,* and *William J. Fitzpatrick* filed a brief for the Securities Industry Association as *amicus curiae* urging reversal.

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented by this case is whether the common-law *in pari delicto* defense bars a private damages action under the federal securities laws against corporate insiders and broker-dealers who fraudulently induce investors to purchase securities by misrepresenting that they are conveying material nonpublic information about the issuer.

I

The respondent investors filed this action in the United States District Court for the Northern District of California, alleging that they incurred substantial trading losses as a result of a conspiracy between Charles Lazzaro, a registered securities broker employed by the petitioner Bateman Eichler, Hill Richards, Inc. (Bateman Eichler), and Leslie Neadeau, President of T. O. N. M. Oil & Gas Exploration Corporation (TONM), to induce them to purchase large quantities of TONM over-the-counter stock by divulging false and materially incomplete information about the company on the pretext that it was accurate inside information.[1] Specifically, Lazzaro is alleged to have told the respondents that he personally knew TONM insiders and had learned, *inter alia*, that (a) "[v]ast amounts of gold had been discovered in Surinam, and TONM had options on thousands of acres in gold-

[1] The investors named Lazzaro, Neadeau, TONM, and Bateman Eichler as defendants. Complaint ¶¶ 5–8, App. 7–8. The investors charged that Neadeau and TONM had "directly and indirectly participated with, aided and abetted, and conspired with" Lazzaro in the scheme. *Id.* ¶ 9, App. 8; see also *id.* ¶ 40, App. 17. Bateman Eichler's liability was premised on its status as a "controlling person" of Lazzaro within the meaning of § 20(a) of the Securities Exchange Act of 1934, 48 Stat. 899, 15 U. S. C. § 78t(a). Complaint ¶¶ 5, 39, App. 7, 16–17. See n. 25, *infra*.

Although Lazzaro, Neadeau, and TONM also are respondents in this Court, see this Court's Rule 19.6, we shall use "respondents" to refer exclusively to the investor plaintiffs, who are defending the judgment of the Court of Appeals for the Ninth Circuit in this Court.

producing regions of Surinam";[2] (b) the discovery was "not publically known, but would subsequently be announced"; (c) TONM was currently engaged in negotiations with other companies to form a joint venture for mining the Surinamese gold; and (d) when this information was made public, "TONM stock, which was then selling from $1.50 to $3.00/share, would increase in value from $10 to $15/share within a short period of time, and . . . might increase to $100/share" within a year. Complaint ¶¶16–17, App. 10–12.[3] Some of the respondents aver that they contacted Neadeau and inquired whether Lazzaro's tips were accurate; Neadeau stated that the information was "not public knowledge" and "would neither confirm nor deny those claims," but allegedly advised that "Lazzaro was a very trustworthy and a good man." *Id.* ¶19, App. 12.

The respondents admitted in their complaint that they purchased TONM stock, much of it through Lazzaro, "on the premise that Lazzaro was privy to certain information not otherwise available to the general public." *Id.* ¶15, App. 10. Their shares initially increased dramatically in price, but ultimately declined to substantially below the purchase price when the joint mining venture fell through. *Id.* ¶¶22–26, App. 13–14.[4]

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[2] Gold exploration has been conducted in Surinam for more than 100 years, but production has declined dramatically since early in this century. Complaint ¶11, App. 9. The areas in which TONM had been engaged in exploration "were historically mined by Surinamese natives using primitive methods," and were accessible to the outside world "primarily by motorized canoes and helicopter." *Id.* ¶12, App. 9. Lazzaro allegedly told the investors that TONM's discovery "compared favorably to, if not better than, those in South Africa," and that development "would not require deep mining" because "[g]eologists in Surinam were finding gold nuggets in dry creek beds." *Id.* ¶16, App. 11.

[3] Lazzaro also allegedly told the investors that, after the announcement, TONM shareholders "would *automatically* receive" additional stock in TONM's subsidiary, International Gold and Diamond Exploration Corp., Inc., "without the payment of any additional monies." *Ibid.* (emphasis in original).

[4] The respondents purchased the stock in late 1979 and early 1980 for between $1.50 and $3 per share, and the price of the stock rose to $7 per

Lazzaro and Neadeau are alleged to have made the representations set forth above knowing that the representations "were untrue and/or contained only half-truths, material omissions of fact and falsehoods,"[5] intending that the respondents would rely thereon, and for the purpose of "influenc[ing] and manipulat[ing] the price of TONM stock" so as "to profit themselves through the taking of commissions and secret profits." *Id.* ¶¶23, 30, 38, App. 13, 15–16.[6] The respondents contended that this scheme violated, *inter alia*, § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j(b),[7] and Securities and Exchange Commis-

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share by the fourth quarter of 1980. *Id.* ¶22, App. 13. "[S]ome or all" of the respondents claim to have told Lazzaro at this time that they wanted to sell their shares, but "Lazzaro stated that he would let the plaintiffs know when to sell the TONM stock, and that they should not sell just because the stock had reached $7.00/share because it would go higher still." *Ibid.* The stock then plummeted "to approximately $1.00 per share" by the end of 1980, and fell to "less than . . . $1.00 a share" early the next year. *Id.* ¶¶24–25, App. 14.

[5] In the alternative, Lazzaro and Neadeau are alleged to have made these representations "recklessly with wanton disregard for the truth." *Id.* ¶32, App. 15.

[6] Neadeau is alleged to have owned approximately 100,000 shares of the outstanding common stock of TONM, and Lazzaro is alleged to have "controlled over a million shares of TONM stock through stock purchased by himself and his clients." *Id.* ¶¶8, 23, App. 8, 13. See also *id.* ¶16, App. 12 ("Lazzaro and his relatives owned a large block of TONM stock"). The investors charged that "Lazzaro could thereby and did influence and manipulate the price of TONM stock through purchases and sales thereof, and through the dissemination of false information to plaintiffs and others." *Id.* ¶23, App. 13.

[7] That section provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . . . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as

sion (SEC) Rule 10b–5 promulgated thereunder, 17 CFR § 240.10b–5 (1984).[8] They sought capital losses and lost profits, punitive damages, and costs and attorney's fees. App. 26.[9]

The District Court dismissed the complaint for failure to state a claim. The court reasoned that "trading on insider information is itself a violation of rule 10b–5" and that the allegations in the complaint demonstrated that the respondents themselves had "violated the particular statutory provision under which recovery is sought." App. to Pet. for Cert. C–2. Thus, the court concluded, the respondents were *in pari delicto* with Lazzaro and Neadeau and absolutely barred from recovery. *Ibid.*

The Court of Appeals for the Ninth Circuit reversed. *Berner* v. *Lazzaro*, 730 F. 2d 1319 (1984). Although it

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necessary or appropriate in the public interest or for the protection of investors."

[8] That Rule provides:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

"(a) To employ any device, scheme, or artifice to defraud,

"(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

[9] In addition, the respondents sought recovery pursuant to § 17(a) of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U. S. C. § 77q(a), see Complaint ¶¶ 48–50, App. 20, which the parties and the courts below have treated as comparable to § 10(b) for purposes of applying the *in pari delicto* defense. We express no view as to whether a private right of action exists under § 17(a). Compare *Keys* v. *Wolfe*, 709 F. 2d 413, 416 (CA5 1983), with *Stephenson* v. *Calpine Conifers II, Ltd.*, 652 F. 2d 808, 815 (CA9 1981). The respondents also alleged various other federal claims and pendent state-law claims that are not before us.

assumed that the respondents had violated the federal securities laws, *id.*, at 1324, the court nevertheless concluded that "securities professionals and corporate officers who have allegedly engaged in fraud should not be permitted to invoke the *in pari delicto* doctrine to shield themselves from the consequences of their fraudulent misrepresentation," *id.*, at 1320. The Court of Appeals noted that this Court had sharply restricted the availability of the *in pari delicto* defense in antitrust actions, see *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S. 134 (1968), and concluded that, essentially for three reasons, there was no basis "for creating a different rule for private actions initiated under the federal securities laws," 730 F. 2d, at 1322. First, the court reasoned that, in cases such as this, defrauded tippees are not in fact "equally responsible" for the violations they allege. *Ibid.* Second, the court believed that allowing the defense in these circumstances would be "totally incompatible with the overall aims of the securities law" because the threat of a private damages action is necessary to deter "insider-tipster[s]" from defrauding the public. *Id.*, at 1323. Finally, the court noted the availability of means other than an outright preclusion of suit to deter tippees from trading on inside information. *Id.*, at 1324, n. 3.

The lower courts have divided over the proper scope of the *in pari delicto* defense in securities litigation.[10] We granted certiorari. 469 U. S. 1105 (1985). We affirm.

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[10] See, *e. g.*, *Tarasi* v. *Pittsburgh National Bank*, 555 F. 2d 1152 (CA3) (allowing defense), cert. denied, 434 U. S. 965 (1977); *Malamphy* v. *Real-Tex Enterprises, Inc.*, 527 F. 2d 978 (CA4 1975) *(per curiam)* (sustaining submission of defense to jury); *Woolf* v. *S. D. Cohn & Co.*, 515 F. 2d 591, 601–605 (CA5 1975) (rejecting defense on facts of case), on rehearing, 521 F. 2d 225, vacated and remanded on other grounds, 426 U. S. 944 (1976); *Kuehnert* v. *Texstar Corp.*, 412 F. 2d 700 (CA5 1969) (allowing defense); *Kirkland* v. *E. F. Hutton & Co.*, 564 F. Supp. 427, 433–437 (ED Mich. 1983) (rejecting defense on motion for summary judgment); *Grumet* v. *Shearson/American Express, Inc.*, 564 F. Supp. 336 (NJ 1983) (allowing

II

The common-law defense at issue in this case derives from the Latin, *in pari delicto potior est conditio defendentis:* "In a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one."[11] The defense is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers;[12] and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.[13] In its classic for-

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defense); *Xaphes* v. *Shearson, Hayden, Stone, Inc.*, 508 F. Supp. 882, 884–887 (SD Fla. 1981) (rejecting defense on motion to dismiss); *Moholt* v. *Dean Witter Reynolds, Inc.*, 478 F. Supp. 451 (DC 1979) (rejecting defense on motion for summary judgment); *In re Haven Industries, Inc.*, 462 F. Supp. 172, 177–180 (SDNY 1978) (allowing defense); *Nathanson* v. *Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50 (SDNY 1971) (rejecting defense); *Wohl* v. *Blair & Co.*, 50 F. R. D. 89 (SDNY 1970) (denying motion to strike defense). Cf. *Silverberg* v. *Paine, Webber, Jackson & Curtis, Inc.*, 710 F. 2d 678, 691 (CA11 1983); *Mallis* v. *Bankers Trust Co.*, 615 F. 2d 68, 76 (CA2 1980), cert. denied, 449 U. S. 1123 (1981); *Can-Am Petroleum Co.* v. *Beck*, 331 F. 2d 371, 373 (CA10 1964).

[11] Black's Law Dictionary 711 (5th ed. 1979).

[12] See, *e. g.*, *Higgins* v. *McCrea*, 116 U. S. 671, 685 (1886); *Austin's Adm'x* v. *Winston's Ex'x*, 11 Va. 33, 47 (1806) ("He who comes here for relief must draw his justice from pure fountains"). See also *Holman* v. *Johnson*, 1 Cowp. 341, 343, 98 Eng. Rep. 1120, 1121 (K. B. 1775):

"The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed . . . . The principle of public policy is this; ex dolo malo non oritur actio [out of fraud no action arises] . . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

[13] See, *e. g.*, *McMullen* v. *Hoffman*, 174 U. S. 639, 669–670 (1899):

"To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be

mulation, the *in pari delicto* defense was narrowly limited to situations where the plaintiff truly bore at least substantially equal responsibility for his injury, because "in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto; for there may be, and often are, very different degrees in their guilt." 1 J. Story, Equity Jurisprudence 304–305 (13th ed. 1886) (Story). Thus there might be an "inequality of condition" between the parties, *id.*, at 305, or "a confidential relationship between th[em]" that determined their "relative standing" before a court, 3 J. Pomeroy, Equity Jurisprudence § 942a, p. 741 (5th ed. 1941) (Pomeroy). In addition, the public policy considerations that undergirded the *in pari delicto* defense were frequently construed as precluding the defense even where the plaintiff bore substantial fault for his injury: "[T]here may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be." 1 Story 305. Notwithstanding these traditional limitations, many courts have given the *in pari delicto* defense a broad application to bar actions where plaintiffs simply have been involved generally in "the same sort of wrongdoing" as defendants. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S., at 138.[14]

In *Perma Life*, we emphasized "the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." *Ibid.* That case involved a treble-damages action against a Midas Muffler franchisor by several of its dealers, who alleged that the franchise agreement created a conspiracy to restrain trade in violation

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to enter into them. In that way the public secures the benefit of a rigid adherence to the law."

[14] See also *Tarasi* v. *Pittsburgh National Bank*, 555 F. 2d, at 1157; L. Loss, Fundamentals of Securities Regulation 1197 (1983); Comment, Availability of an *In Pari Delicto* Defense in Rule 10b–5 Tippee Suits, 77 Colum. L. Rev. 1084, 1086, n. 15 (1977).

of the Sherman and Clayton Acts.[15] The lower courts barred the action on the grounds that the dealers, as parties to the agreement, were *in pari delicto* with the franchisor. In reversing that determination, the opinion for this Court emphasized that there was no indication that Congress had intended to incorporate the defense into the antitrust laws, which "are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating [illegal] business behavior." *Id.*, at 139. Accordingly, the opinion concluded that "the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action." *Id.*, at 140. The opinion reserved the question whether a plaintiff who engaged in "truly complete involvement and participation in a monopolistic scheme"—one who "aggressively support[ed] and further[ed] the monopolistic scheme as a necessary part and parcel of it"—could be barred from pursuing a damages action, finding that the muffler dealers had relatively little bargaining power and that they had been coerced by the franchisor into agreeing to many of the contract's provisions. *Ibid.*

In separate opinions, five Justices agreed that the concept of "equal fault" should be narrowly defined in litigation arising under federal regulatory statutes.[16] "[B]ecause of the strong public interest in eliminating restraints on competition, . . . many of the refinements of moral worth demanded of plaintiffs by . . . many of the variations of *in pari delicto* should not be applicable in the antitrust field." *Id.*, at 151 (MARSHALL, J., concurring in result). The five Justices concluded, however, that where a plaintiff truly bore at least substantially equal responsibility for the violation, a defense

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[15] Sherman Act, 26 Stat. 209 *et seq.*, as amended, 15 U. S. C. § 1 *et seq.*; Clayton Act, 38 Stat. 730 *et seq.*, as amended, 15 U. S. C. § 12 *et seq.*

[16] See 392 U. S., at 145 (WHITE, J., concurring); *id.*, at 147–148 (Fortas, J., concurring in result); *id.*, at 148–149, 151 (MARSHALL, J., concurring in result); *id.*, at 154–155 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

based on such fault—whether or not denominated *in pari delicto*—should be recognized in antitrust litigation.[17]

Bateman Eichler argues that *Perma Life*—with its emphasis on the importance of analyzing the effects that fault-based defenses would have on the enforcement of congressional goals—is of only marginal relevance to a private damages action under the federal securities laws. Specifically, Bateman Eichler observes that Congress *expressly* provided for private antitrust actions—thereby manifesting a "desire to go beyond the common law in the antitrust statute in order to provide substantial encouragement to private enforcement and to help deter anticompetitive conduct"—whereas private rights of action under § 10(b) of the Securities Exchange Act of 1934 are merely *implied* from that provision[18]—thereby, apparently, supporting a broader application of the *in pari delicto* defense. Brief for Petitioner 32. Bateman Eichler buttresses this argument by observing that, unlike the Sherman and Clayton Acts, the securities laws contain savings provisions directing that "[t]he rights and remedies provided by [those laws] shall be in addition to any and all other rights and remedies that may exist at law or in equity"[19]—again, apparently, supporting a broader scope for fault-based defenses than recognized in *Perma Life*.

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[17] JUSTICE WHITE concluded that "the *in pari delicto* defense in its historic formulation is not a useful concept" in antitrust law, but emphasized that he "would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them." *Id.*, at 143, 146. The other four Justices would have allowed explicit, though limited, use of the *in pari delicto* defense itself. *Id.*, at 147 (Fortas, J., concurring in result); *id.*, at 148–149 (MARSHALL, J., concurring in result); *id.*, at 153 (Harlan, J., joined by Stewart, J., concurring in part and dissenting in part).

[18] See *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975); *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971).

[19] See § 16 of the Securities Act of 1933, 48 Stat. 84, 15 U. S. C. § 77p; § 28(a) of the Securities Exchange Act of 1934, 48 Stat. 903, as amended, 15 U. S. C. § 78bb(a).

We disagree. Nothing in *Perma Life* suggested that public policy implications should govern only where Congress expressly provides for private remedies; the classic formulation of the *in pari delicto* doctrine itself required a careful consideration of such implications before allowing the defense. See *supra*, at 307. Moreover, we repeatedly have emphasized that implied private actions provide "a most effective weapon in the enforcement" of the securities laws and are "a necessary supplement to Commission action." *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 432 (1964); see also *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975). In addition, we have eschewed rigid common-law barriers in construing the securities laws. See, *e. g.*, *Herman & MacLean* v. *Huddleston*, 459 U. S. 375, 388–389 (1983) (common-law doctrines are sometimes of "questionable pertinence" in applying the securities laws, which were intended "to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry"); *A. C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, 312 U. S. 38, 43 (1941) (rejecting the unclean-hands defense on the facts of the case because it would "seriously hinder rather than aid the real purpose" of the securities laws).[20] We therefore conclude that the views expressed in *Perma Life* apply with full force to implied causes of action under the federal securities laws. Accordingly, a private action for damages in these circumstances may be barred on the grounds of the plaintiff's own culpability only where (1) as a direct result of his own actions, the plaintiff bears at least substantially equal responsibility for the violations he seeks

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[20] In *Frost*, we quoted approvingly from an SEC memorandum arguing that "'[i]t appears to us to be entirely immaterial whether in such a case, the agreement is labelled "void" or the parties are held to be "in pari delicto." There, labels, as often is the case, merely state the conclusion reached, but do not aid in solution of the problem. The ultimate issue is whether the result in the particular case would effectuate or frustrate the purposes of the Act.'" 312 U. S., at 44, n. 2.

to redress, and (2) preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

A

The District Court and Court of Appeals proceeded on the assumption that the respondents had violated § 10(b) and Rule 10b–5, see *supra*, at 304–305—an assumption we accept for purposes of resolving the issue before us. Cf. *A. C. Frost & Co.* v. *Coeur d'Alene Mines Corp.*, *supra*, at 40–41.[21]

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[21] We note, however, the inappropriateness of resolving the question of the respondents' fault solely on the basis of the allegations set forth in the complaint. A tippee generally has a duty to disclose or to abstain from trading on material nonpublic information only when he knows or should know that his insider source "has breached his fiduciary duty to the shareholders by disclosing the information"—in other words, where the insider has sought to "benefit, directly or indirectly, from his disclosure." *Dirks* v. *SEC*, 463 U. S. 646, 660, 662 (1983). Such benefit can derive from the insider's use of the information to secure a "pecuniary gain," a "reputational benefit that will translate into future earnings," or simply to confer "a gift of confidential information to a trading relative or friend." *Id.*, at 663–664. See also *id.*, at 655, n. 14 (alternative basis for liability where tippee has "entered into a special confidential relationship in the conduct of the business of the enterprise and [is] given access to information solely for corporate purposes"). Although the respondents certainly were aware that Lazzaro stood to gain from disclosure by the commissions he would earn, it is uncertain whether they had any basis to believe that Neadeau—the insider from whose potential breach all liability flows—had violated his fiduciary duties to TONM's shareholders by revealing the joint-venture information to Lazzaro. The respondents might well have believed that Neadeau provided the information to Lazzaro as a favor or otherwise acted against the shareholders' interests, but the complaint does not set forth sufficient facts to conclude that this was the case.

In addition, we accept the lower courts' assumption about the respondents' violations notwithstanding the uncertain character of the information the respondents traded on. The complaint rather strongly suggests that much of the information Lazzaro conveyed about the explorations and joint-venture negotiations was true, but that it was deceptive by virtue of exaggeration and the failure to include additional material information. See Complaint ¶¶ 10–12, 18, 20, 30, App. 8–9, 12–13, 15. If this was the

Bateman Eichler contends that the respondents' *delictum* was substantially *par* to that of Lazzaro and Neadeau for two reasons. First, whereas many antitrust plaintiffs participate in illegal restraints of trade only "passively" or as the result of economic coercion, as was the case in *Perma Life*, the ordinary tippee acts *voluntarily* in choosing to trade on inside information. Second, § 10(b) and Rule 10b–5 apply literally to "any person" who violates their terms, and do not recognize gradations of culpability.

We agree that the typically voluntary nature of an investor's decision impermissibly to trade on an inside tip renders the investor more blameworthy than someone who is party to a contract solely by virtue of another's overweening bargaining power. We disagree, however, that an investor who engages in such trading is necessarily as blameworthy as a corporate insider or broker-dealer who discloses the information for personal gain. Notwithstanding the broad reach of § 10(b) and Rule 10b–5, there are important distinctions

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case, and if the respondents otherwise acquired a derivative duty within the meaning of *Dirks*, there is no question that their trading on the basis of this information violated the securities laws. If the information was *entirely* false, the SEC and Bateman Eichler contend that the respondents, by trading on what they believed was material nonpublic information, are nevertheless guilty of at least an *attempted* violation of the securities laws if they otherwise believed that Neadeau had breached his fiduciary duties. This view has drawn substantial support among the lower courts. See, *e. g.*, *Tarasi* v. *Pittsburgh National Bank*, 555 F. 2d, at 1159–1160; *Kuehnert* v. *Texstar Corp.*, 412 F. 2d, at 704; *Grumet* v. *Shearson/American Express, Inc.*, 564 F. Supp., at 340. The respondents, on the other hand, contend that they could not have inherited any duty to disclose *false* information, and that the case is properly viewed as governed by the doctrine of legal impossibility, which would bar any liability, rather than factual impossibility, which would permit liability on an attempt theory. See also Note, The Availability of the *In Pari Delicto* Defense in Tippee-Tipper Rule 10b–5 Actions After *Dirks* v. *SEC*, 62 Wash. U. L. Q. 519, 540–542 (1984). Because this issue has not been fully briefed and was not considered by the courts below, we express no views on it and simply proceed on the assumption that the respondents' activities rendered them *in delicto*.

between the relative culpabilities of tippers, securities professionals, and tippees in these circumstances. The Court has made clear in recent Terms that a tippee's use of material nonpublic information does not violate § 10(b) and Rule 10b–5 unless the tippee owes a corresponding duty to disclose the information. *Dirks* v. *SEC*, 463 U. S. 646, 654–664 (1983); *Chiarella* v. *United States*, 445 U. S. 222, 230, n. 12 (1980). That duty typically is "derivative from . . . the insider's duty." *Dirks* v. *SEC*, *supra*, at 659; see also *id.*, at 664. In other words, "[t]he tippee's obligation has been viewed as arising from his role as a participant after the fact in the insider's breach of a fiduciary duty" toward corporate shareholders. *Chiarella* v. *United States*, *supra*, at 230, n. 12.[22] In the context of insider trading, we do not believe that a person whose liability is solely derivative can be said to be as culpable as one whose breach of duty gave rise to that liability in the first place.[23]

Moreover, insiders and broker-dealers who selectively disclose material nonpublic information commit a potentially broader range of violations than do tippees who trade on the basis of that information. A tippee trading on inside information will in many circumstances be guilty of fraud against individual shareholders, a violation for which the tipper shares responsibility. But the insider, in disclosing such information, also frequently breaches fiduciary duties toward the issuer itself.[24] And in cases where the tipper

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[22] We also have noted that a tippee may be liable if he otherwise "misappropriate[s] or illegally obtain[s] the information." *Dirks* v. *SEC*, *supra*, at 665. Cf. H. R. Rep. No. 98–355, pp. 14–15 (1983).

[23] Our view is reinforced by Congress' recent enactment of the Insider Trading Sanctions Act of 1984, § 2, 98 Stat. 1264–1265, 15 U. S. C. § 78u(d)(2) (1982 ed., Supp. III), which imposes civil penalties on nontrading tippers out of the belief that, "[a]bsent the tipper's misconduct, the tippee's trading would not occur" and that a tipper is therefore "most directly culpable in a violation," H. R. Rep. No. 98–355, at 9.

[24] See *Dirks* v. *SEC*, 463 U. S., at 655; Comment, 77 Colum. L. Rev., *supra* n. 14, at 1094, and n. 64.

intentionally conveys false or materially incomplete information to the tippee, the tipper commits an additional violation: fraud against the tippee. Such conduct is particularly egregious when committed by a securities professional, who owes a duty of honesty and fair dealing toward his clients. Cf. 3 Pomeroy § 942a, at 741. Absent other culpable actions by a tippee that can fairly be said to outweigh these violations by insiders and broker-dealers, we do not believe that the tippee properly can be characterized as being of substantially equal culpability as his tippers.

There is certainly no basis for concluding at this stage of this litigation that the respondents were *in pari delicto* with Lazzaro and Neadeau. The allegations are that Lazzaro and Neadeau masterminded this scheme to manipulate the market in TONM securities for their own personal benefit, and that they used the purchasing respondents as unwitting dupes to inflate the price of TONM stock. The respondents may well have violated the securities laws, and in any event we place no "stamp of approval" on their conduct. *Chiarella* v. *United States*, *supra*, at 238 (STEVENS, J., concurring). But accepting the facts set forth in the complaint as true—as we must in reviewing the District Court's dismissal on the pleadings—Lazzaro and Neadeau "awakened in [the respondents] a desire for wrongful gain that might otherwise have remained dormant, inspired in [their] mind[s] an unfounded idea that [they were] going to secure it, and then by fraud and false pretenses deprived [them] of [their] money," *Stewart* v. *Wright*, 147 F. 321, 328–329 (CA8), cert. denied, 203 U. S. 590 (1906)—actions that, if they occurred, were far more culpable under any reasonable view than the respondents' alleged conduct.[25]

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[25] Bateman Eichler has sought a reversal of the Ninth Circuit's judgment solely on the grounds that the investors were *in pari delicto* with its employee Lazzaro. *Amicus* Securities Industry Association (SIA), however, contends that the *in pari delicto* defense should in any event bar recovery against a brokerage firm whose only role has been that of a "controlling

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We also believe that denying the *in pari delicto* defense in such circumstances will best promote the primary objective of the federal securities laws—protection of the investing public and the national economy through the promotion of "a high standard of business ethics . . . in every facet of the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 186–187 (1963). Although a number of lower courts have reasoned that a broad rule of *caveat tippee* would better serve this goal,[26] we believe the contrary position adopted by other courts represents the better view.[27]

To begin with, barring private actions in cases such as this would inexorably result in a number of alleged fraudulent practices going undetected by the authorities and unremedied. The SEC has advised us that it "does not have the resources to police the industry sufficiently to ensure that false tipping does not occur or is consistently discovered," and that "[w]ithout the tippees' assistance, the Commission could not effectively prosecute false tipping—a difficult practice to detect." Brief for SEC as *Amicus Curiae* 25. See also H. R. Rep. No. 93–355, p. 6 (1983) ("In recent years, the securities markets have grown dramatically in size and complexity, while Commission enforcement resources have declined"). Thus it is particularly important to permit

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person" of the defrauding employee, see n. 1, *supra*, and whose liability is therefore "vicarious" and "secondary." Brief for SIA as *Amicus Curiae* 20–24. This issue was not addressed by the Ninth Circuit, and Bateman Eichler has not raised it either in this Court or in the Ninth Circuit. We therefore express no views with respect to the liability of brokerage firms as "controlling persons" in cases such as this.

[26] See, *e. g.*, *Tarasi* v. *Pittsburgh National Bank*, 555 F. 2d, at 1163–1164; *Kuehnert* v. *Texstar Corp.*, 412 F. 2d, at 705; *Grumet* v. *Shearson/American Express, Inc.*, 564 F. Supp., at 340; *Wohl* v. *Blair & Co.*, 50 F. R. D., at 93.

[27] See, *e. g.*, *Kuehnert* v. *Texstar Corp.*, *supra*, at 706 (Godbold, J., dissenting); *Kirkland* v. *E. F. Hutton & Co.*, 564 F. Supp., at 435–436; *Nathanson* v. *Weis, Voisin, Cannon, Inc.*, 325 F. Supp., at 54–57.

"litigation among guilty parties [that will serve] to expose their unlawful conduct and render them more easily subject to appropriate civil, administrative, and criminal penalties." *Kuehnert* v. *Texstar Corp.*, 412 F. 2d 700, 706, n. 3 (CA5 1969) (Godbold, J., dissenting). The *in pari delicto* defense, by denying any incentive to a defrauded tippee to bring suit against his defrauding tipper, would significantly undermine this important goal.[28]

Moreover, we believe that deterrence of insider trading most frequently will be maximized by bringing enforcement pressures to bear on the sources of such information—corporate insiders and broker-dealers.

> "The true insider or the broker-dealer is at the fountainhead of the confidential information . . . . If the prophylactic purpose of the law is to restrict the use of all material inside information until it is made available to the investing public, then the most effective means of carrying out this policy is to nip in the bud the source of the information, the tipper, by discouraging him from 'making the initial disclosure which is the first step in the chain of dissemination.' This can most readily be achieved by making unavailable to him the defense of in pari delicto when sued by his tippee upon charges based upon alleged misinformation." *Nathanson* v. *Weis*,

[28] Our analysis is buttressed by reference to § 9(e) of the Securities Exchange Act of 1934, 48 Stat. 890, 15 U. S. C. § 78i(e), which allows coconspirators a right of contribution against "any person who, if joined in the original suit, would have been liable to make the same payment." This provision overrides the common-law rule against contribution from coconspirators, which was grounded on the premise that "parties generally *in pari delicto* should be left where they are found." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 635 (1981). As the Commission observes, "[s]urely, the Congress that provided that a brokerage professional such as Lazzaro could recover from his fellow manipulators should be understood to have also permitted the victims of Lazzaro's manipulative scheme to sue him." Brief for SEC as *Amicus Curiae* 26.

Voisin, Cannon, Inc., 325 F. Supp. 50, 57–58 (SDNY 1971).

In addition, corporate insiders and broker-dealers will in many circumstances be more responsive to the deterrent pressure of potential sanctions; they are more likely than ordinary investors to be advised by counsel and thereby to be informed fully of the "allowable limits on their conduct." *Kuehnert* v. *Texstar Corp.*, 412 F. 2d, at 706 (Godbold, J., dissenting).[29] Although situations might well arise in which the relative culpabilities of the tippee and his insider source merit a different mix of deterrent incentives, we therefore conclude that in tipper-tippee situations such as the one before us the factors discussed above preclude recognition of the *in pari delicto* defense.[30]

Lower courts reaching a contrary conclusion have typically asserted that, absent a vigorous allowance of the *in pari delicto* defense, tippees would have, "in effect, an enforceable

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[29] It also has been suggested that "tippees constitute a potentially larger class and deterrent measures aimed exclusively at tippees, even if proportionately as successful, will still leave a large number of violations undeterred. Thus, [even if] tippers and tippees are assumed to be equally responsive to deterrent measures, it would appear preferable to increase deterrent pressure against tippers by allowing tippee recovery." Comment, 77 Colum. L. Rev., *supra* n. 14, at 1096–1097 (footnote omitted).

[30] Some courts have suggested that "even in a case where the fault of plaintiff and defendant were relatively equal, simultaneous and mutual, the court might still reject the *[in pari delicto]* defense if it appeared that the defendant's unlawful activities were of a sort likely to have a substantial impact on the investing public, and the primary legal responsibility for and ability to control that impact is with defendant." *Woolf* v. *S. D. Cohn & Co.*, 515 F. 2d, at 604; see also *Mallis* v. *Bankers Trust Co.*, 615 F. 2d, at 76, n. 6. Because there is no basis at this stage of the litigation for concluding that the respondents bore substantially equal responsibility for the violations they seek to redress, we need not address the circumstances in which preclusion of suit might otherwise significantly interfere with the effective enforcement of the securities laws and protection of the investing public.

warranty that secret information is true," *id.*, at 705, and thus no incentive *not* to trade on that information.[31] These courts have reasoned, in other words, that tippees in such circumstances would be in "the enviable position of 'heads-I-win tails-you-lose,'" *Wolfson* v. *Baker*, 623 F. 2d 1074, 1082 (CA5 1980), cert. denied, 450 U. S. 966 (1981)—if the tip is correct, the tippee will reap illicit profits, while if the tip fails to yield the expected return, he can sue to recover damages.

We believe the "enforceable warranty" theory is overstated and overlooks significant factors that serve to deter tippee trading irrespective of whether the *in pari delicto* defense is allowed. First, tippees who bring suit in an attempt to cash in on their "enforceable warranties" expose themselves to the threat of substantial civil and criminal penalties for their own potentially illegal conduct.[32] Second, plaintiffs in litigation under § 10(b) and Rule 10b–5 may only recover against defendants who have acted with scienter. See *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185 (1976). Thus "if the tip merely fails to 'pan out' or if the information itself proves accurate but the stock fails to move in the anticipated direction, the investor stands to lose all of his investment. Only in the situation where the investor has been deliberately defrauded will he be able to maintain a private suit in an attempt to recoup his money." 730 F. 2d, at 1324, n. 3.[33]

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[31] See, *e. g.*, *Wolfson* v. *Baker*, 623 F. 2d 1074, 1082 (CA5 1980), cert. denied, 450 U. S. 966 (1981); *Tarasi* v. *Pittsburgh National Bank*, 555 F. 2d, at 1163–1164; *In re Haven Industries, Inc.*, 462 F. Supp., at 179–180.

[32] In addition to potential liability under § 10(b) and Rule 10b–5, investors also are subject to liability under §§ 2 and 3 of the Insider Trading Sanctions Act of 1984, 98 Stat. 1264–1265, 15 U. S. C. §§ 78u(d)(2), 78ff(a) (1982 ed., Supp. III), which imposes severe civil sanctions on persons who have illegally used inside information, as well as criminal fines of up to $100,000.

[33] The SEC also argues that courts should deter tippees in cases such as this by limiting potential recovery to out-of-pocket losses. The courts below did not address this issue, and we express no views on the proper measure of relief. Cf. *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U. S., at 140.

We therefore conclude that the public interest will most frequently be advanced if defrauded tippees are permitted to bring suit and to expose illegal practices by corporate insiders and broker-dealers to full public view for appropriate sanctions. As the Ninth Circuit emphasized in this case, there is no warrant to giving corporate insiders and broker-dealers "a license to defraud the investing public with little fear of prosecution." *Id.*, at 1323.

Affirmed.

CHIEF JUSTICE BURGER concurs in the judgment.

JUSTICE MARSHALL took no part in the decision of this case.

CALDWELL *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 83–6607. Argued February 25, 1985—Decided June 11, 1985

In a bifurcated proceeding conducted pursuant to Mississippi's capital punishment statute, petitioner was convicted of murder and sentenced to death. Petitioner's lawyers in their closing argument at the sentencing stage, referred to petitioner's youth, family background, and poverty, as well as to general character evidence, and they asked the jury to show mercy, emphasizing that the jury should confront the gravity and responsibility of calling for another's death. In response, the prosecutor urged the jury not to view itself as finally determining whether petitioner would die, because a death sentence would be reviewed for correctness by the Mississippi Supreme Court. That court unanimously affirmed the conviction but affirmed the death sentence by an equally divided court, rejecting, in reliance on *California* v. *Ramos*, 463 U. S. 992, the contention that the prosecutor's comments violated the Eighth Amendment.

Held: The death sentence is vacated.

443 So. 2d 806, reversed in part and remanded.

JUSTICE MARSHALL delivered the opinion of the Court with respect to all but Part IV–A, concluding that:

1. Where an examination of the decision below as to the issue of the prosecutor's comments does not indicate that it rested on adequate and independent state grounds, namely, petitioner's failure to comply with a Mississippi procedural rule as to raising the issue on appeal, this Court does not lack jurisdiction to decide the issue. Pp. 326–328.

2. It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe, as the jury was in this case, that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with and indispensable to the Eighth Amendment's "need for reliability in the determination that death is appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (plurality opinion). Pp. 328–330.

3. There are several reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced sugges-

tions that the sentencing jury may shift its sense of responsibility to an appellate court. Pp. 330–334.

(a) The "delegation" of sentencing responsibility that the prosecutor here encouraged would not simply postpone petitioner's right to a fair determination of the appropriateness of his death; rather, it would deprive him of that right, for an appellate court, unlike the sentencing jury, is ill-suited to evaluate the appropriateness of death in the first instance. Pp. 330–331.

(b) Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can err because the error can be corrected on appeal. A defendant might then be executed, although no sentencer had ever determined that death was the appropriate sentence. Pp. 331–332.

(c) If a jury understands that only a death sentence, and not a life sentence, will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning a death sentence. This presents the specter of the imposition of death based on an irrelevant factor and would also create the danger of a defendant's being executed without any determination that death was the appropriate punishment. P. 332.

(d) The uncorrected suggestion that the jury's responsibility for any ultimate determination of death will rest with others presents the danger that the jury will choose to minimize the importance of its role, especially where, as here, the jury is told that the alternative decisionmaker is the State's highest court. Pp. 332–333.

4. As to the State's contention that the prosecutor's argument was an "invited" response to defense counsel's argument, and thus was not unreasonable, neither the State nor the court below explains how the prosecutor's argument was less likely to have distorted the jury's deliberations because of anything defense counsel said. Pp. 336–337.

5. *Donnelly* v. *DeChristoforo*, 416 U. S. 637, does not preclude a finding of constitutional error based on the sort of impropriety that the prosecutor's argument contains. Although that case warned against holding every improper and unfair argument of a state prosecutor to be a federal constitutional violation, it did not insulate all prosecutorial comments from federal constitutional objections. Pp. 337–340.

JUSTICE MARSHALL, joined by JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS, delivered an opinion with respect to Part IV–A, concluding that *California* v. *Ramos*, *supra*, is not authority for holding that States are free to expose capital sentencing juries to any

information and argument concerning postsentencing procedures. In *Ramos*, the Court, in upholding a state statutory requirement that capital sentencing juries be instructed that the Governor could commute a life sentence without possibility of parole into a lesser sentence, rested on a determination that the instruction was both accurate and relevant to a legitimate state penological interest. In contrast, here the argument was neither accurate nor relevant to such an interest, but was misleading and was not linked to any valid sentencing consideration. Pp. 335–336.

JUSTICE O'CONNOR, being of the view that the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility, concluded that *Ramos*, *supra*, does not sanction a misleading picture of the jury's role nor does it suggest that the Constitution prohibits the giving of accurate and nonmisleading instructions regarding postsentencing procedures. Pp. 341–342.

MARSHALL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III, IV–B, IV–C, and V, in which BRENNAN, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined, and an opinion with respect to Part IV–A, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 341. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 343. POWELL, J., took no part in the decision of the case.

E. Thomas Boyle argued the cause and filed briefs for petitioner.

William S. Boyd III, Special Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief were *Edwin Lloyd Pittman*, Attorney General, and *Marvin L. White, Jr.*, Special Assistant Attorney General.*

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*Briefs of *amici curiae* were filed for the State of Arizona et al. by *David Crump*, *Jean F. Powers*, *Robert K. Corbin*, Attorney General of Arizona, *Steve Clark*, Attorney General of Arkansas, *Austin J. McGuigan*, Chief State's Attorney of Connecticut, and *John M. Massameno*, Assistant State's Attorney, *Jim Smith*, Attorney General of Florida, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *William J. Guste, Jr.*, Attorney General of Louisiana, *John Ashcroft*, Attorney General of Missouri, *Michael T. Greely*, Attorney Gen-

JUSTICE MARSHALL delivered the opinion of the Court, except as to Part IV–A.

This case presents the issue whether a capital sentence is valid when the sentencing jury is led to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case. In this case, a prosecutor urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court. We granted certiorari, 469 U. S. 879 (1984), to consider petitioner's contention that the prosecutor's argument rendered the capital sentencing proceeding inconsistent with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion). Agreeing with the contention, we vacate the sentence.[1]

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eral of Montana, *Paul L. Douglas*, Attorney General of Nebraska, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *Michael C. Turpen*, Attorney General of Oklahoma, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *Jim Mattox*, Attorney General of Texas, and *Gerald L. Baliles*, Attorney General of Virginia; and for the National Association of Criminal Defense Lawyers et al. by *Daniel F. Kolb*, *Nancy R. Grunberg*, *Ephraim Margolin*, *Richard J. Wilson*, *Dennis N. Balske*, and *John Charles Boger*.

[1] Petitioner also raises a challenge to his conviction, arguing that there was constitutional infirmity in the trial court's refusal to appoint various experts and investigators to assist him. Mississippi law provides a mechanism for state appointment of expert assistance, and in this case the State did provide expert psychiatric assistance to Caldwell at state expense. But petitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than "the general statement that the requested expert 'would be of great necessarius witness.'" 443 So. 2d 806, 812 (1983). Given that petitioner offered little

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Petitioner shot and killed the owner of a small grocery store in the course of robbing it. In a bifurcated proceeding conducted pursuant to Mississippi's capital punishment statute, petitioner was convicted of capital murder and sentenced to death.

In their case for mitigation, petitioner's lawyers put on evidence of petitioner's youth, family background, and poverty, as well as general character evidence. In their closing arguments they referred to this evidence and then asked the jury to show mercy. The arguments were in large part pleas that the jury confront both the gravity and the responsibility of calling for another's death, even in the context of a capital sentencing proceeding.

> "[E]very life is precious and as long as there's life in the soul of a person, there is hope. There is hope, but life is one thing and death is final. So I implore you to think deeply about this matter. It is his life or death—the decision you're going to have to make, and I implore you to exercise your prerogative to spare the life of Bobby Caldwell. . . . I'm sure [the prosecutor is] going to say to you that Bobby Caldwell is not a merciful person, but I say unto you he is a human being. That he has a life that rests in your hands. You can give him life or you can give him death. It's going to be your decision. I don't know what else I can say to you but we live in a society where we are taught that an eye for an eye is not the solution. . . . You are the judges and you will have to decide his fate. It is an awesome responsibility, I know—an awesome responsibility." App. 18–19.

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more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. Cf. *Ake* v. *Oklahoma*, 470 U. S. 68, 82–83 (1985) (discussing showing that would entitle defendant to psychiatric assistance as matter of federal constitutional law). We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.

In response, the prosecutor sought to minimize the jury's sense of the importance of its role. Indeed, the prosecutor forcefully argued that the defense had done something wholly illegitimate in trying to force the jury to feel a sense of responsibility for its decision. The prosecutor's argument, defense counsel's objection, and the trial court's ruling were as follows:

> "ASSISTANT DISTRICT ATTORNEY: Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .
>
> "COUNSEL FOR DEFENDANT: Your Honor, I'm going to object to this statement. It's out of order.
>
> "ASSISTANT DISTRICT ATTORNEY: Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.
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> "THE COURT: Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.
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> "ASSISTANT DISTRICT ATTORNEY: Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is auto-

matically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so." *Id.*, at 21–22.

On review, the Mississippi Supreme Court unanimously affirmed the conviction but divided 4–4 on the validity of the death sentence, thereby affirming the sentence by an equally divided court. 443 So. 2d 806 (1983). Relying on this Court's decision in *California* v. *Ramos*, 463 U. S. 992 (1983), the prevailing opinion flatly rejected the contention that the prosecutor's comments could constitute a violation of the Eighth Amendment: "By *[Ramos']* reasoning, states may decide whether it is error to mention to jurors the matter of appellate review." 443 So. 2d, at 806. The dissent did not dispute this view of *Ramos*, but did argue that as a matter of state law the prosecutor's argument was sufficiently unfair as to require that the death sentence be vacated. 443 So. 2d, at 815 (Lee, J., dissenting). The prevailing justices, however, found no basis in state law for disturbing the sentence. *Id.*, at 806–807. Petitioner argues to this Court, as he argued below, that *Ramos* does not control this case and that the prosecutor's comments violated the Eighth Amendment.

II

Respondent first argues that this Court lacks jurisdiction to decide this issue because the decision of the Mississippi Supreme Court rests on adequate and independent state grounds. See *Herb* v. *Pitcairn*, 324 U. S. 117 (1945). Although petitioner interposed a contemporaneous objection to the prosecutor's argument, he did not initially assign the issue as error on appeal. Under Mississippi rules, "[n]o error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified." Miss. Sup. Ct. Rule 6(b) (1976). In this case, the State Supreme Court raised the issue of the prosecutor's

comments *sua sponte*. It was discussed at oral argument, in postargument briefs submitted by both sides, and in the opinion of the State Supreme Court. Respondent nevertheless argues that the decision below rests on the state-law ground of failure to comply with Rule 6.

The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. See *Ulster County Court* v. *Allen*, 442 U. S. 140, 152–154 (1979). Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Id.*, at 1041

An examination of the decision below reveals that it contains no clear or express indication that "separate, adequate, and independent" state-law grounds were the basis for the court's judgment. Indeed, the reference to the waiver issue in the prevailing opinion below, although somewhat cryptic, argues against the position urged by respondent. The State Supreme Court stated:

> "*Prueitt* v. *State*, 261 So. 2d 119 (Miss. 1972), is a case in which we dealt with the situation where counsel sought to argue a question not raised by the assignment of error. Writing for the Court in that case, Justice Jones states 'We do not deem these matters [those not assigned] plain error . . . .' *Bell* v. *State*, 360 So. 2d 1206 (Miss. 1978) . . . is analogous to the present case, in

> that *Bell* dealt with errors 'not urged or argued in the briefs . . . .'" 443 So. 2d, at 814.

Prueitt was a noncapital case decided by the Mississippi Supreme Court on the basis of procedural bar. But in *Bell*, a capital case, that court refused to rest on the procedural bar, raising on its own motion certain claims not assigned as error on appeal. It then decided those claims on the merits, explicitly holding that they were unmeritorious. 360 So. 2d, at 1215. Because *Bell* explicitly rested on the merits, and because the court below described *Bell* as "analogous to the present case in that that [it] *dealt* with errors 'not urged or argued in the briefs,'" 443 So. 2d, at 814 (emphasis added), we can read the opinion below only as meaning that procedural waiver was not the basis of the decision.

This conclusion is substantially bolstered by the fact that the Mississippi court discussed the challenge to the prosecutor's argument at some length, evaluating it as a matter of both federal and state law before rejecting it as unmeritorious. Moreover, this conclusion is consistent with the Mississippi Supreme Court's behavior in other capital cases, where it has a number of times declined to invoke procedural bars. See, *e. g.*, *Williams* v. *State*, 445 So. 2d 798, 810 (1984) (explicitly citing *Bell* as authority for the proposition that "we have in death penalty cases the prerogative of relaxing our contemporaneous objection and plain error rules when the interests of justice so require"); *Culberson* v. *State*, 379 So. 2d 499, 506 (1979) (reaching merits "only because this is a capital case" where counsel failed to follow Rule requiring prior objections to jury instructions). Given the standards of *Michigan* v. *Long* and *Ulster County Court*, it is apparent that we have jurisdiction.

III

A

On reaching the merits, we conclude that it is constitutionally impermissible to rest a death sentence on a determina-

tion made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S., at 998–999. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).[2]

In evaluating the various procedures developed by States to determine the appropriateness of death, this Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State. Thus, as long ago as the pre-*Furman* case of *McGautha* v. *California*, 402 U. S. 183 (1971), Justice Harlan, writing for the Court, upheld a capital sentencing scheme in spite of its reliance on jury discretion. The sentencing scheme's premise, he assumed, was "that jurors confronted with the truly awesome responsibility of decreeing

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[2] See also *Barefoot* v. *Estelle*, 463 U. S. 880, 924 (1983) (BLACKMUN, J., dissenting) (*Woodson*'s concern for assuring heightened reliability in the capital sentencing determination "is as firmly established as any in our Eighth Amendment jurisprudence"); *Eddings* v. *Oklahoma*, 455 U. S., at 118 (O'CONNOR, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake"); *Godfrey* v. *Georgia*, 446 U. S. 420, 443 (1980) (BURGER, C. J., dissenting) ("[I]n capital cases we must see to it that the jury has rendered its decision with meticulous care").

death for a fellow human will act with due regard for the consequences of their decision . . . ." *Id.*, at 208. Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an "awesome responsibility" has allowed this Court to view sentencer discretion as consistent with—and indeed as indispensable to—the Eighth Amendment's "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, *supra*, at 305 (plurality opinion). See also *Eddings* v. *Oklahoma*, *supra*; *Lockett* v. *Ohio*, *supra*.

B

In the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.

(1)

Bias against the defendant clearly stems from the institutional limits on what an appellate court can do—limits that jurors often might not understand. The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson*, *supra*, at 304. When we held that a defendant has a constitutional right to the consideration of such factors, *Eddings*, *supra*; *Lockett*, *supra*, we

clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses. As the dissenters below noted:

> "The [mercy] plea is made directly to the jury as only they may impose the death sentence. Under our standards of appellate review mercy is irrelevant. There is no appellate mercy. Therefore, the fact that review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die." 443 So. 2d, at 817 (Lee, J., joined by Patterson, C. J., and Prather and Robertson, JJ., dissenting).

Given these limits, most appellate courts review sentencing determinations with a presumption of correctness. This is the case in Mississippi, where, as the dissenters below pointed out: "Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness." *Id.*, at 816 (Lee, J., joined by Patterson, C. J., and Prather and Robertson, JJ., dissenting). See also Miss. Code Ann. § 99–19–105 (Supp. 1984) (defining scope of appellate review of capital sentencing).

(2)

Writing on this kind of prosecutorial argument in a prior case, JUSTICE STEVENS noted another reason why it presents an intolerable danger of bias toward a death sentence: Even when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to "send a message" of extreme disapproval for the defendant's acts. This desire might make the jury very receptive to the prosecutor's assurance that it can more freely "err because the error may be corrected on appeal." *Maggio* v. *Williams*, 464 U. S. 46, 54–55 (1983) (concurring in judgment). A defendant might thus be executed, although no

sentencer had ever made a determination that death was the appropriate sentence.

(3)

Bias could similarly stem from the fact that some jurors may correctly assume that a sentence of life in prison could not be increased to a death sentence on appeal. See *Arizona* v. *Rumsey*, 467 U. S. 203, 211 (1984). The chance that this will be the assumption of at least some jurors is increased by the fact that, in an argument like the one in this case, appellate review is only raised as an issue with respect to the reviewability of a death sentence. If the jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibility for sentencing can only be effectuated by returning that sentence. But for a sentencer to impose a death sentence out of a desire to avoid responsibility for its decision presents the specter of the imposition of death based on a factor wholly irrelevant to legitimate sentencing concerns. The death sentence that would emerge from such a sentencing proceeding would simply not represent a decision that the State had demonstrated the appropriateness of the defendant's death.[3] This would thus also create the danger of a defendant's being executed in the absence of any determination that death was the appropriate punishment.

(4)

In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly

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[3] We note that in Mississippi, for example, "[i]f the jury does not make the findings requiring the death sentence" the court must impose a sentence of life imprisonment. Miss. Code Ann. § 99–19–101(3)(c) (Supp. 1984). Indeed, "[i]f the jury cannot, within a reasonable time, agree as to punishment" the court must similarly impose a sentence of life imprisonment. § 99–19–103.

attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio* 438 U. S. 586 (1978); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976). Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role. Indeed, one can easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

This problem is especially serious when the jury is told that the alternative decisionmakers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision than has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death sentence is simply too great.

C

It is, therefore, not surprising that legal authorities almost uniformly have strongly condemned the sort of argument offered by the prosecutor here. For example, this has been the view of almost all of the State Supreme Courts that have dealt with this question since *Furman* v. *Georgia*, 408

U. S. 238 (1972).[4] Indeed, even before *Furman* the sort of argument offered by the prosecutor here was viewed as clearly improper by most state courts, whether in capital or noncapital cases.[5] The American Bar Association, in its standards for prosecutorial conduct, agrees with this judgment.[6] And even the Mississippi Supreme Court, since deciding *Caldwell*, has adopted the position that arguments very similar to that used here are sufficiently improper to merit vacating a death sentence. See *Wiley* v. *State*, 449 So. 2d 756 (1984); *Williams* v. *State*, 445 So. 2d 798 (1984).

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[4] See, *e. g.*, *Hawes* v. *State*, 240 Ga. 327, 333, 240 S. E. 2d 833, 839 (1977) (setting aside death sentence in spite of counsel's failure to object to prosecutor's argument); *Fleming* v. *State*, 240 Ga. 142, 146, 240 S. E. 2d 37, 40 (1977) (setting aside death sentence in spite of curative instruction); *State* v. *Willie*, 410 So. 2d 1019, 1034–1035 (La. 1982) (use of this argument by prosecutor calls for setting aside death sentence even in the absence of other improprieties); *State* v. *Jones*, 296 N. C. 495, 498–499, 251 S. E. 2d 425, 427 (1979) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though there was no contemporaneous objection); *State* v. *White*, 286 N. C. 395, 404–405, 211 S. E. 2d 445, 450 (1975) (ordering new trial on issue of guilt in capital case where argument was used during guilt phase even though trial judge gave curative instruction); *State* v. *Gilbert*, 273 S. C. 690, 696–698, 258 S. E. 2d 890, 894 (1979) (setting aside death sentence in spite of defendant's failure to raise issue on appeal).

[5] See, *e. g.*, *People* v. *Morse*, 60 Cal. 2d 631, 649–653, 388 P. 2d 33, 44–47 (1964); *Pait* v. *State*, 112 So. 2d 380, 383–384 (Fla. 1959); *Blackwell* v. *State*, 79 So. 731, 735–736 (Fla. 1918); *People* v. *Johnson*, 284 N. Y. 182, 30 N. E. 2d 465 (1940); *Beard* v. *State*, 19 Ala. App. 102, 95 So. 333 (1923). See generally Annot., Prejudicial Effect of Statement of Prosecutor that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities, 3 A. L. R. 3d 1448 (1965); Annot., Prejudicial Effect of Statement of Court that if Jury Makes Mistake in Convicting It Can Be Corrected by Other Authorities, 5 A. L. R. 3d 974 (1966).

[6] See ABA Standards for Criminal Justice 3–5.8 (2d ed. 1980) ("References to the likelihood that other authorities, such as the governor or the appellate courts, will correct an erroneous conviction are impermissible efforts to lead the jury to shirk responsibility for its decision"). *Id.*, at 3·90.

IV

The State advances three arguments for why the death sentence should be upheld despite the prosecutor's comments. First, the State argues that under *California* v. *Ramos*, 463 U. S. 992 (1983), each State may decide for itself the extent to which a capital sentencing jury should know of postsentencing proceedings. Second, it defends the prosecutor's comments as "invited," in the sense that they were a reasonable response to defense counsel's arguments. Last, the State asserts that an application of this Court's decision in *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), precludes a finding of constitutional error based on the sort of impropriety that the state prosecutor's comments are said to contain. None of these arguments is persuasive.

A

Both respondent and the prevailing justices of the Mississippi Supreme Court interpreted *California* v. *Ramos*, *supra*, as if it had held that States are free to expose capital sentencing juries to any information and argument concerning postsentencing procedures. This is too broad a view of *Ramos*.

Ramos concerned the constitutionality of California's statutory requirement that capital sentencing juries be informed that the State Governor could commute a sentence of life imprisonment without possibility of parole into a lesser sentence that included the possibility of parole. In upholding this requirement, the Court rested on a determination that this instruction was both accurate and relevant to a legitimate state penological interest—that interest being a concern for the future dangerousness of the defendant should he ever return to society. 463 U. S., at 1001–1006. The Court concluded that this legitimate sentencing concern gave the jury a valid interest in accurate information on the possibility of parole.

In contrast, the argument at issue here cannot be said to be either accurate or relevant to a valid state penological interest. The argument was inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform. Similarly, the prosecutor's argument is not linked to any arguably valid sentencing consideration. That appellate review is available to a capital defendant sentenced to death is no valid basis for a jury to return such a sentence if otherwise it might not. It is simply a factor that in itself is wholly irrelevant to the determination of the appropriate sentence. The argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible. Creating this image in the minds of the capital sentencers is not a valid state goal, and *Ramos* is not to the contrary. Indeed, *Ramos* itself never questioned the indispensability of sentencers who "appreciat[e] . . . the gravity of their choice and . . . the moral responsibility reposed in them as sentencers." *Id.*, at 1011.

B

Respondent next defends the view of the Mississippi Supreme Court that the prosecutor's argument must be understood as a response to the defense counsel's argument, and that it was not unreasonable in that context. But neither respondent nor the court below explains how the prosecutor's argument was less likely to have distorted the jury's deliberations because of anything defense counsel said.

The Mississippi Supreme Court was less than clear as to the theory of "context" it embraced. The prevailing justices commented on two aspects of the defense's arguments. First, "during defense counsel's argument, . . . he inaccurately sought to convince the jury that if they meted out a life sentence the defendant would remain in prison the remainder

of his life. He left them with the impression that there would be no parole or commutation of sentence." 443 So. 2d, at 814. Second, the opinion noted that "[defense counsel had] emphasized his pitch for mercy by referring to the Ten Commandments, Jesus and the Heavenly Father." *Ibid.*

The first of these arguments, of course, recalls *Ramos*, in which the Court stated that an instruction describing the alternative to a death sentence as "'life imprisonment without possibility of parole' may generate the misleading impression that the Governor could not commute this sentence to one that included the possibility of parole." 463 U. S., at 1004–1005, n. 19. But although in *Ramos* the Court concluded that this possible misimpression underscored a valid sentencing need to give more information on the Governor's power to commute life sentences, there is no rational link between the possibility of this specific misimpression and the argument used by the prosecutor in this case. The prosecutor's argument simply had nothing to do with the consequences that would flow from the life sentence mentioned by defense counsel.

The connection between defense counsel's references to religious themes and texts and the prosecutor's arguments regarding appellate review is similarly unclear. As the dissenting justices noted: "Assuming without accepting the majority's position that the defense counsel's argument invited error, it did not invite this error. Asking the jury to show mercy does not invite comment on the system of appellate review. This is true whether the plea for mercy discusses Christian, Judean or Buddhist philosophies, quotes Shakespeare or refers to the heartache suffered by the accused's mother." 443 So. 2d, at 817.

C

The State seeks to bolster its argument regarding the context of the prosecutor's comments by arguing that, under this Court's decision in *Donnelly* v. *DeChristoforo*, *supra*, the comments of a state prosecutor should rarely be considered

violative of federal constitutional rights. The State points out that *Donnelly* stands for the proposition that "not every trial error or infirmity which might on direct appeal of a federal conviction call for an application of a federal appellate court's . . . supervisory powers correspondingly constitute the denial of due process." Brief for Respondent 25. But although *Donnelly* does clearly warn against holding every improper and unfair argument of a state prosecutor to be a federal due process violation, it does not insulate all prosecutorial comments from federal constitutional objections. For a number of reasons, this case is substantially different from *Donnelly*.

Donnelly was a first-degree murder case in which a state prosecutor responded to defense counsel's expression of hope that the jury would return a verdict of not guilty by saying "I quite frankly think that [the defendant and his attorney] hope that you find him guilty of something a little less than first-degree murder." 416 U. S., at 640. DeChristoforo's attorney objected and the trial judge later gave this curative instruction:

> "'Closing arguments are not evidence for your consideration. . . .
>
> "'Now in his closing, the District Attorney, I noted made a statement: "I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder." There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney.
>
> "'Consider the case as though no such statement was made.'" *Id.*, at 641.

The Supreme Judicial Court of Massachusetts viewed the prosecutor's comment as improper but "held that it was not so prejudicial as to require a mistrial and further stated that the trial judge's instruction 'was sufficient to safeguard the

defendant's rights.'" *Ibid.* Although the District Court denied habeas relief, the Court of Appeals granted it. This Court reversed because an "examination of the entire proceedings" did not support the contention that the "prosecutor's remark . . . by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*, at 643.

Two important factors, both emphasized in *Donnelly*, distinguish *Donnelly* from Caldwell's case. Most important, the trial judge in *Donnelly*, who observed the prosecutor's remarks as well as the whole of the trial, had agreed that those remarks were improper, had believed that the unfairness was correctable through an instruction, and had in fact given the jury a strong curative instruction. As this Court said:

> "[T]he trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. The prosecutor, as is customary, had previously told the jury that his argument was not evidence, and the trial judge specifically re-emphasized that point. Then the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it. Although some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character." *Id.*, at 644 (footnotes omitted).

The trial judge in this case not only failed to correct the prosecutor's remarks, but in fact openly agreed with them; he stated to the jury that the remarks were proper and necessary, strongly implying that the prosecutor's portrayal of the jury's role was correct.

Second, the prosecutor's remarks in *Donnelly* were quite different from the remarks challenged here. The *Donnelly* Court emphasized that the prosecutor's comment was "ad-

mittedly an ambiguous one," *id.*, at 645, and declared that the case was not one "in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right." *Id.*, at 643 (citing *Griffin* v. *California*, 380 U. S. 609 (1965)). Here, in contrast, the prosecutor's remarks were quite focused, unambiguous, and strong. They were pointedly directed at the issue that this Court has described as "the principal concern" of our jurisprudence regarding the death penalty, the "procedure by which the State imposes the death sentence." *California* v. *Ramos*, 463 U. S., at 999. In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U. S., at 305 (plurality opinion). Such comments, if left uncorrected, might so affect the fundamental fairness of the sentencing proceeding as to violate the Eighth Amendment.[7]

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[7] The dissent argues that *Donnelly* does in fact control this case because the prosecutor's argument regarding appellate review was "corrected" by later prosecutorial comments, even if uncorrected by the judge. We disagree.

In the dissent's view, because the prosecutor did later say that the jury played an important role in the sentencing process, the argument as a whole merely emphasized "that the jury was not *solely* responsible for petitioner's sentence." *Post*, at 348. But even if the prosecutor's later comments did leave the jury with the view that they had an important role to play, the prosecutor did not retract, or even undermine, his previous insistence that the jury's determination of the appropriateness of death would be reviewed by the appellate court to assure its correctness. As we have discussed, in one crucial sphere of a system of capital punishment, the capital sentencer comes very near to being "*solely* responsible for [the defendant's] sentence," *ibid.*, and that is when it makes the often highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves." *Zant* v. *Stephens*, 462 U. S. 862, 900 (1983) (REHNQUIST, J., concurring in judgment). It is beyond question that an

V

This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its "truly awesome responsibility." In this case, the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death. Because we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires. The sentence of death must therefore be vacated. Accordingly, the judgment is reversed to the extent that it sustains the imposition of the death penalty, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE O'CONNOR, concurring in part and concurring in the judgment.

I join the judgment and the opinion of the Court, with the exception of Part IV–A. I write separately to express my views about the Court's discussion of *California* v. *Ramos*, 463 U. S. 992 (1983), in Part IV–A. I do not read *Ramos* to imply that the giving of *nonmisleading* and *accurate* information regarding the jury's role in the sentencing scheme is irrelevant to the sentencing decision.

The Court distinguishes the prosecutor's remarks regarding appellate review in this case from the Briggs instruction in *Ramos*, which informed the jury that the Governor could

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appellate court, performing its task with a presumption of correctness, would be relatively incapable of evaluating the "literally countless factors that [a capital sentencer] consider[s,]" *id.*, at 901, in making what is largely a moral judgment of the defendant's desert. The prosecutor's erroneous suggestion that a moral judgment in favor of death would be reviewed for error—a suggestion endorsed by the trial judge—was never corrected.

commute a life sentence without parole. The Court observes that the Briggs instruction in *Ramos* was "both accurate and relevant to a legitimate state penological interest—that interest being a concern for the future dangerousness of the defendant should he ever return to society." *Ante*, at 335. The statement here, the Court concludes, was neither accurate nor relevant. In my view, the prosecutor's remarks were impermissible because they were inaccurate and misleading in a manner that diminished the jury's sense of responsibility. I agree there can be no "valid state penological interest" in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case. *Ante*, at 336.

The Court, however, seems generally to characterize information regarding appellate review as "wholly irrelevant to the determination of the appropriate sentence." *Ibid.* The Court correctly observes that *Ramos* does not imply that "States are free to expose capital sentencing juries to any information and argument concerning postsentencing procedures" no matter how inaccurate. *Ante*, at 335. Certainly, a misleading picture of the jury's role is not sanctioned by *Ramos*. See *California* v. *Ramos*, *supra*, at 1010. But neither does *Ramos* suggest that the Federal Constitution prohibits the giving of accurate instructions regarding postsentencing procedures. See 463 U. S., at 1004, n. 19, 1012, n. 27.

Jurors may harbor misconceptions about the power of state appellate courts or, for that matter, *this* Court to override a jury's sentence of death. Should a State conclude that the reliability of its sentencing procedure is enhanced by accurately instructing the jurors on the sentencing procedure, including the existence and limited nature of appellate review, I see nothing in *Ramos* to foreclose a policy choice in favor of jury education.

As the Court notes, however, the Mississippi prosecutor's argument accomplished the opposite result. In telling the jurors, "your decision is not the final decision . . . [y]our job

is reviewable," the prosecutor sought to minimize the sentencing jury's role, by creating the mistaken impression that automatic appellate review of the jury's sentence would provide the authoritative determination of whether death was appropriate. In fact, under Mississippi law the reviewing court applies a "presumption of correctness" to the sentencing jury's verdict. 443 So. 2d 806, 817 (1983) (Lee, J., dissenting). The jury's verdict of death may be overturned only if so arbitrary that it "was against the overwhelming weight of the evidence," or if the evidence of statutory aggravating circumstances is so lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict." *Williams* v. *State*, 445 So. 2d 798, 811 (Miss. 1984).

Laypersons cannot be expected to appreciate without explanation the limited nature of appellate review, especially in light of the reassuring picture of "automatic" review evoked by the sentencing court and the prosecutor in this case. *Ante*, at 325–326. Although the subsequent remarks of the prosecutor to which JUSTICE REHNQUIST refers in his dissent, *post*, at 345–346, may have helped to restore the jurors' sense of the importance of their role, I agree with the Court that they failed to correct the impression that the appellate court would be free to reverse the death sentence if it disagreed with the jury's conclusion that death was appropriate. See *ante*, at 340–341, n. 7. I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that "the death penalty [may have been] meted out arbitrarily or capriciously," *California* v. *Ramos*, *supra*, at 999, or through "whim . . . or mistake," *Eddings* v. *Oklahoma*, 455 U. S. 104, 118 (1982) (concurring opinion).

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE WHITE join, dissenting.

The Court holds that under the Eighth Amendment it is "constitutionally impermissible to rest a death sentence on

a determination made by a sentencer who has been led to believe that the responsibility for the appropriateness of the defendant's death rests elsewhere." *Ante*, at 328–329. Even if I were to agree with this proposition in the abstract, I do not believe that under the circumstances of this case it can properly be applied to justify the overturning of petitioner's death sentence.

Petitioner robbed a grocery and bait shop owned by a Mr. and Mrs. Faulkner. When Mrs. Faulkner screamed, petitioner shot her twice and fled with a bank bag taken from the counter. After a trial the jury found petitioner guilty of capital murder, and the case proceeded to the sentencing phase. At that point the prosecution sought to prove four aggravating factors under Mississippi law, including the facts that the offense was committed while petitioner was engaged in a robbery, and that petitioner had previously been convicted of four felonies involving the use of threats or violence to the person. With respect to the latter factor the prosecution introduced evidence that petitioner had been convicted of felonies four times since 1975—twice for armed robbery, once for attempted armed robbery, and once for aggravated assault. In mitigation petitioner introduced testimony from family and friends emphasizing petitioner's youth and his sound upbringing, and indicating that he was a nice person and a hard worker.

At the guilt phase the jurors had been instructed that they were the "sole judges of the facts," and that it was their duty to find those facts in accordance with the evidence presented, and to apply the rules of law charged by the judge to the facts found. The jurors were also charged that statements made by counsel were not evidence. Prior to closing argument at the sentencing phase the judge further charged the jury that it "must now decide whether the Defendant will be sentenced to death or to life imprisonment." To return the death penalty, the jury was instructed that it must find at least one aggravating circumstance, and that the aggravating circumstances found must outweigh the mitigating circumstances.

Counsel then presented closing arguments. Pursuant to Mississippi law the prosecutor spoke first and last; his initial statement for the most part argued the aggravating factors, and petitioner does not complain of anything said there. Defense counsel then spoke; as the Court indicates, this argument consisted mostly of a plea for mercy, which emphasized the jury's "awesome responsibility." The prosecutor then made the rebuttal argument of which petitioner complains. Because the Court mischaracterizes the prosecutor's statements, it is worth noting again what the prosecutor actually said:

> "I'm in complete disagreement with the approach the defense has taken. . . . I think it's unfair. . . . Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable."

At this point defense counsel objected, but the trial court allowed the prosecutor to continue after stating: "I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused."

Counsel continued:

> "[Defense counsel] insinuat[ed] that your decision is the final decision and that they're gonna take Bobby Caldwell out in front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court."

The Court's account stops here, but the prosecutor went on to state:

> "Now, thank God, you have a yardstick to follow. Thank God, you have a set of rules and regulations like they do in a football game. What are the rules and

> regulations that you, under your oath, must follow in determining the punishment? Number 1, under your oath, you must decide the facts. That's your job. Not mine, not theirs, not the Judge's, not anybody's—yours. You decide what those facts are. I can't tell you what they are, and you take the rules of law—this right here—the rule book, and you apply them, and you render a fair and impartial trial without passion, without prejudice, without sympathy." (Emphasis supplied.)

The prosecutor then recounted some of the recent history of capital punishment in this country, explaining that this Court originally struck down state capital punishment statutes because of its perception that the death penalty was being imposed arbitrarily. The prosecutor concluded by noting that in response to this Court's concern over arbitrariness

> "our Mississippi Legislature . . . adopted the very procedure that you are undergoing now. They said before the death penalty is arbitrarily automatically imposed, *the Jury—the people—the people, not the Court—the people, the heart of the system, must determine—must determine—that the aggravating circumstances, those which tend to say that the death penalty is justified must outweigh the mitigating circumstances, those which say that the lesser should be applied. So, that's how it all evolved, and that's why you're in the Jury Box to determine the punishment*, and that's why, I think it's totally improper to put you in the picture of hang man with a black mask on. That's not fair. You must take the rules, apply the law, and render a fair verdict."

At several points in its opinion the Court supplies its own characterization of the prosecutor's argument. Thus, the Court states that this is a case where "a sentencer . . . has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere,"

ante, at 329, and that "[t]he argument here urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death—a determination which would eventually be made by others and for which the jury was not responsible." *Ante*, at 336. See also *ante*, at 333. The Court then builds on this characterization by supplying a further assumption—that a jury that has a lowered sense of responsibility is more likely to vote for the death penalty. The Court hypothesizes that a capital sentencing jury may wish to "send a message" of disapproval even though it is not convinced that death is the appropriate punishment, and that a jury that has been assured that any "error" in imposing the death penalty can be corrected on appeal may feel comfortable with "delegating" its responsibility by voting for death. This "delegation" of responsibility to the appellate courts violates the Eighth Amendment, the Court reasons, because an appellate court is unable to confront and examine the individual circumstances of the defendant firsthand, and is further bound to review the jury's determination with a presumption of correctness. Finally, after distinguishing our decisions in *California* v. *Ramos*, 463 U. S. 992 (1983), and *Donnelly* v. *DeChristoforo*, 416 U. S. 637 (1974), the Court concludes that the sentence here must be overturned because the prosecutor's argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Ante*, at 340 (quoting *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion)).

In *Donnelly* v. *DeChristoforo*, this Court rejected a claim that a state murder conviction should be overturned on due process grounds because of statements made by the prosecutor during closing argument. We there stressed that "not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the

very concept of justice.'" 416 U. S., at 642 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)). Similarly, this Court's recent opinions concerning the Eighth Amendment, while recognizing that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination," *California* v. *Ramos*, *supra*, at 998–999, have also noted that in general the Eighth Amendment is satisfied where the procedures ensure that the sentencer's discretion is "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983); *Barclay* v. *Florida*, 463 U. S. 939, 950 (1983) (plurality opinion). Thus, in both *Zant* and *Barclay* we upheld death sentences despite the fact that they had been based in part on invalid aggravating circumstances, where the jury also had found valid aggravating circumstances.

Donnelly, *Zant*, and *Barclay* teach that a death sentence need not be vacated in every case where the procedures by which it is imposed are in some way flawed. If the prosecutor in this case actually had argued to the jury that it should go ahead and impose the death sentence because it did not really matter—the appellate court would correct any "mistake" the jury might make in choice of sentence—and if the trial judge had not corrected such an argument, I might well agree that the process afforded did not comport with some constitutional norm related to procedural fairness. But despite the Court's sweeping characterization the argument here fell far short of telling the jury that it would not be responsible for imposing the death penalty. Admittedly, some of the remarks early in the prosecutor's rebuttal indicated that the jury's decision was not "final" because it was subject to appellate review. But viewed in its entirety, cf. *Cupp* v. *Naughten*, 414 U. S. 141 (1973), it is evident that the thrust of the prosecutor's argument was that the jury was not *solely* responsible for petitioner's sentence. In ad-

dition to appellate review, the prosecutor referred to the decision of the Mississippi Legislature to allow capital punishment, to the rules that the jury must follow in determining the appropriate sentence, and to the jury's ultimate responsibility under the law to render a "fair verdict," "without passion, without prejudice, without sympathy."

There is nothing wrong with urging a capital sentencing jury to disregard emotion and render a decision based on the law and the facts. Despite the Court's rhetorical references to the need for "reliable" sentencing decisions rendered by jurors that comprehend their "awesome responsibility," I do not understand the Court to believe that emotions in favor of mercy must play a part in the ultimate decision of a capital sentencing jury. Indeed, much of our Eighth Amendment jurisprudence has been concerned with eliminating emotion from sentencing decisions. Here the prosecutor *did not* suggest that the prospect of appellate review should lead the jurors to lean toward the death penalty, and the prosecutor's statements that followed the challenged portion of the argument forcefully emphasized the jury's important role under Mississippi law in determining whether to impose death.

Indeed, under the circumstances here the importance of the jury's role could hardly have been lost on the jurors themselves. The charge at the guilt phase highlighted the jurors' role as factfinders and their duty to follow the law in reaching their conclusions. The importance of their role at sentencing was evident from the charge, from the impassioned plea for mercy from petitioner's counsel, petitioner, and petitioner's mother, as well as from the prosecutor's rebuttal. It is indeed difficult to agree with the Court that a group subjected to all this attention nevertheless interpreted a few remarks by the prosecutor to mean that the group's decision was no more than a sideshow—a mere "preliminary step" toward the ultimate sentencing determination.

Once it is recognized that the Court has overstated the seriousness of the prosecutor's comments the Court's analy-

sis tumbles like a house of cards. Given that it is highly unlikely that the jury's sense of responsibility was diminished, there is no need to respond to the Court's conjecture that the jury would in addition have "delegated" its responsibility by erring in favor of imposing the death penalty. And even assuming that the challenged statements were in some way infirm, I believe this is a case where we should heed the directives of *Donnelly*, *Zant*, and *Barclay*, and hold that any error did not amount to constitutional error. During the course of a heated trial prosecutors may make many statements that stray from debating society rules as to relevancy, but the ultimate inquiry must be whether the statements rendered the proceedings as a whole fundamentally unfair. I do not believe this analysis is substantially altered because the challenged statements were made during a capital sentencing proceeding. Although the fact that this is a capital case calls for careful review of applicable legal principles, it seems to me that the Court's concern would be essentially the same if at the guilt phase the prosecutor had told the jury to go ahead and convict because any mistakes would be corrected on appeal. Cf. *ante*, at 334, n. 5, and authorities cited therein.

I therefore find unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the statements here. The Court's string citations to our prior cases, many of which yielded only plurality opinions, which hold that capital sentencing juries must be allowed to consider all forms of mitigating evidence so as to facilitate individualized and rational determinations of the appropriateness of capital punishment, simply highlight the lack of authority for the path that the Court now takes. Nor do I find particularly illuminating the citation to dicta that the Eighth Amendment requires procedures that will ensure a "reliable" determination that death is an appropriate punishment. Although the Eighth Amendment requires certain processes designed to prevent the arbitrary imposition of

capital punishment, it does not follow that every proceeding that strays from the optimum is *ipso facto* constitutionally unreliable. *Zant* and *Barclay* hold as much.

Nor does the Eighth Amendment prohibit any and all communication to a capital sentencing jury concerning the availability of appellate review. In *California* v. *Ramos*, we upheld against Eighth Amendment challenge a California statute that required capital sentencing juries to be informed that the sentence of life without possibility of parole was subject to commutation by the Governor. We noted, *inter alia*, that the instruction was "merely an accurate statement of a potential sentencing alternative," 463 U. S., at 1009, and held that informing the jury of the possibility of commutation did not inject too speculative a concern into the jury's deliberations. Although we noted in *Ramos* that the challenged information bore more than marginal relevance to the jury's sentencing determination, *Ramos* is not distinguishable from this case on that ground; there is no constitutional requirement that all information received by a sentencing jury be "relevant." In any event, the fact that the jury's determination is subject to appellate review, if not common knowledge, is in any event information concerning the judicial process that one would think the jury is entitled to know. Nor do I think this case distinguishable from *Ramos* because here the prosecutor's statements "misrepresented" the appellate process. There are circumstances where misrepresentations by prosecutors will violate due process, see *Miller* v. *Pate*, 386 U. S. 1 (1967); *Brady* v. *Maryland*, 373 U. S. 83 (1963), but here the reference to appellate review certainly did not include an express statement that such review was *de novo*, and any implication along those lines was cured by the later statements emphasizing the jury's responsibility under the Mississippi sentencing scheme.

This Court should avoid turning every perceived departure from what it conceives to be optimum procedure in a capital case into a ground for constitutional reversal. In this case

the State of Mississippi proved four aggravating factors, including that petitioner previously had been convicted of four crimes involving threat of violence to a person. The jury was instructed to find the facts based upon the evidence and to apply those facts to the law as charged; at the sentencing proceeding it was told that it must find that the aggravating factors outweighed the mitigating factors, and the prosecutor's argument stressed these aspects of the jury's singular duty. There is no indication in the record that the jury returned the death sentence on any basis other than the evidence adduced, nor is there any reason to question the jury's conclusion. Under those circumstances I do not think that the Eighth Amendment or any other provision of the Constitution requires that petitioner's death sentence be overturned.* I would affirm the judgment of the Mississippi Supreme Court.

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*The Court notes that other state courts have condemned the type of argument challenged here, *ante*, at 334, and that the Mississippi Supreme Court, since its decision in this case, has also found such an argument to be reversible error. See *Williams* v. *State*, 445 So. 2d 798 (1984). But these facts suggest that draconic intervention by this Court in the name of the Eighth Amendment generally is not required to correct aspects of state procedure that appear less than ideal to all of us. Doctrinal development in the tradition of the common law, where state-court decisions commend themselves not by their authority but by their reason, ultimately bids fair to remedy such minor departures from procedural norms as may be involved in this case.

JOHNSON ET AL. *v.* MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–518. Argued April 22, 1985—Decided June 17, 1985*

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits employers from discriminating on the basis of age against employees who are between the ages of 40 and 70 by, *inter alia*, discharging them or requiring them to retire involuntarily, except when age is shown to be "a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." When the ADEA was amended in 1974 and 1978 to extend it to federal employees and to eliminate substantially all federal age limits on employment, the provision of the federal civil service statute, 5 U. S. C. § 8335(b), which requires most federal firefighters to retire at age 55, was left untouched. Petitioners, firefighters employed by the city of Baltimore, brought an action in Federal District Court, challenging, on the ground that they violated the ADEA, the city's code provisions that establish for firefighters a mandatory retirement age lower than 70. The city defended on the ground that age is a BFOQ for the position of firefighters. After a trial, the District Court, holding that the city had failed to produce sufficient evidence to make out this defense, invalidated the challenged provisions. The Court of Appeals reversed. Relying on *EEOC* v. *Wyoming*, 460 U. S. 226, in which this Court observed that the ADEA tests a State's discretion to impose a mandatory retirement age "against a reasonable federal standard," the Court of Appeals held that 5 U. S. C. § 8335(b) furnished such a standard, that, since Congress had selected age 55 as the retirement age for most federal firefighters, as a matter of law the same age constitutes a BFOQ for all state and local firefighters as well, and that therefore the city was not required to make any factual showing as to the need for the mandatory retirement age.

Held: Title 5 U. S. C. § 8335(b) does not, as a matter of law, establish that age 55 is a BFOQ for nonfederal firefighters within the meaning of the ADEA. Pp. 360–371.

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*Together with No. 84–710, *Equal Employment Opportunity Commission* v. *Mayor and City Council of Baltimore et al.*, also on certiorari to the same court.

(a) The "reasonable federal standard" to which this Court referred in *EEOC* v. *Wyoming*, *supra*, is the standard supplied by the ADEA itself, *i. e.*, whether the age limit is a BFOQ. Nothing in the ADEA or the decision in *EEOC* v. *Wyoming* warrants the conclusion that a federal rule, not found in the ADEA, and by its terms applicable only to federal employees, *necessarily* authorizes a state or local government to maintain a mandatory retirement age as a matter of law. The mere fact that some federal firefighters are required to cease work at age 55 does not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters. Pp. 360–362.

(b) Neither the language nor the legislative history of the civil service provision indicates that the retirement age for federal firefighters is based on a congressional determination that age 55 is a BFOQ for firefighters within the meaning of the ADEA. Instead, the provision represents nothing more than a congressional decision that federal firefighters must retire, as a general matter, at age 55. The history of § 8335(b) makes clear that the decision to retire certain federal employees, including firefighters, at an early age was not based on actual occupational qualifications for the covered employment, but rather, in significant part, on an attempt to maintain the image of a youthful work force by making early retirement attractive and financially rewarding. Accordingly, it would be error for a court, faced with a challenge under the ADEA to an age limit for nonfederal firefighters, to give any weight to § 8335(b). Pp. 362–370.

731 F. 2d 209, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

Solicitor General Lee argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 84–710 were *Deputy Solicitor General Wallace*, *Alan I. Horowitz*, *Johnny J. Butler*, and *Vella M. Fink*. *William H. Engelman*, *Harriet E. Cooperman*, and *Paul D. Bekman* filed a brief for petitioners in No. 84–518.

L. William Gawlik argued the cause for respondents in both cases. With him on the brief were *Benjamin L. Brown* and *Ambrose T. Hartman.*†

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†*Alfred Miller* and *Steven S. Honigman* filed a brief for the American Association of Retired Persons urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of New York by *Robert Abrams*, Attorney General, *Robert Hermann*, Solicitor

JUSTICE MARSHALL delivered the opinion of the Court.

The issue is whether a federal statute generally requiring federal firefighters to retire at age 55 establishes, as a matter of law, that age 55 is a bona fide occupational qualification (BFOQ) for nonfederal firefighters within the meaning of the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U. S. C. § 621 *et seq.* (ADEA or Act).

I

Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U. S. C. § 621(b). To this end, the Act today prohibits virtually all employers from discriminating on the basis of age against employees or applicants for employment who are between the ages of 40 and 70 by, for example, discharging them or requiring them to retire involuntarily. §§ 623(a), 631(a). The Act contains one general exception to this prohibition: when age is shown to be "a bona fide occupational qualification reasonably necessary to the normal operation of the par-

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General, and *Harvey M. Berman*, Assistant Attorney General; for the State of Vermont by *Jeffrey L. Amestoy*, Attorney General, and *J. Wallace Malley, Jr.*, Assistant Attorney General; for the National Association for Rights Protection and Advocacy et al. by *Steven J. Schwartz, David Ferleger, David Shaw, Paul Jameson, Daniel Stormer*, and *Nonnie S. Burnes;* and for the National League of Cities by *Frederick Simpich.*

A brief for the Commonwealth of Massachusetts et al. as *amici curiae* was filed by *Francis X. Bellotti*, Attorney General of Massachusetts, *H. Reed Witherby* and *Thomas A. Barnico*, Assistant Attorneys General, and by the Attorneys General of their respective States as follows: *David L. Armstrong* of Kentucky, *LeRoy S. Zimmerman* of Pennsylvania, *Linley E. Pearson* of Indiana, *William J. Guste, Jr.*, of Louisiana, *Edwin Lloyd Pittman* of Mississippi, *William L. Webster* of Missouri, *Irwin I. Kimmelman* of New Jersey, *Anthony Celebrezze, Jr.*, of Ohio, and *W. J. Michael Cody* of Tennessee.

ticular business," § 623(f)(1), an employee may be terminated on the basis of his age before reaching age 70.[1]

Since enacting the ADEA in 1967, Congress has amended its provisions several times. The ADEA originally did not apply to the Federal Government, to the States or their political subdivisions, or to employers with fewer than 25 employees, but in 1974 Congress extended coverage to Federal, State, and local Governments, and to employers with at least 20 workers. §§ 630(b), 633a.[2] Also, while the Act initially covered employees only up to age 65, in 1978 Congress raised the maximum age to 70 for state, local, and private employees and eliminated the cap entirely for federal workers. Age Discrimination in Employment Act Amendments of 1978, § 3(a), 92 Stat. 189, 29 U. S. C. § 631(b) (hereinafter 1978 Amendments).

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[1] Federal employees are covered in a separate section of the Act and are treated differently from nonfederal employees in various ways not relevant to this case. See 29 U. S. C. § 633a (extending antidiscrimination provisions to federal employees, but providing such employees a different remedy for violations); § 631 (establishing 70 as a permissible retirement age for all but federal employees, for whom there is no permissible cap). Cf. *Vance* v. *Bradley*, 440 U. S. 93 (1979) (lower retirement age for federal employees covered by Foreign Service retirement system does not violate equal protection).

[2] See Senate Special Committee on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess., 14, 17–18 (Comm. Print 1973); EEOC, Legislative History of the Age Discrimination in Employment Act 215, 231, 234–235 (1981) (hereinafter Legislative History).

The Act contains several minor exemptions not at issue here. See, *e. g.*, 29 U. S. C. §§ 630(f), 631(c)(1). It additionally empowers the Equal Employment Opportunity Commission (EEOC) to determine BFOQs for federal employees, 29 U. S. C. § 633a(b), and also to establish general exemptions from the ADEA if it finds them to be reasonable and "necessary and proper in the public interest." 29 U. S. C. § 628. In 1980, the EEOC examined the desirability of fixing a retirement age for local firefighters and concluded that such an exemption from the ADEA was not warranted. The Commission found that individual assessments of fitness would be feasible and that age alone would be a poor indicator of ability in this occupation. See App. 5–23.

The 1978 Amendments eliminated substantially all federal age limits on employment, but they left untouched several mandatory retirement provisions of the federal civil service statute applicable to specific federal occupations, including firefighters, air traffic controllers, and law enforcement officers, as well as mandatory retirement provisions applicable to the Foreign Service and the Central Intelligence Agency. Among the provisions that were left unaffected by the 1978 Amendments is 5 U. S. C. § 8335(b), which requires certain federal law enforcement officers and firefighters to retire at age 55 if they have sufficient years of service to qualify for a pension and their agency does not find that it is in the public interest to continue their employment.[3] As a result, most federal firefighters must retire at age 55, despite the provisions of the ADEA. At issue here is the effect of this age limit for federal firefighters on the ADEA's application to state and local firefighters.

A

Six firefighters brought this action in the District Court for the District of Maryland challenging the city of Baltimore's municipal code provisions that establish for firefighters and police personnel a mandatory retirement age lower than 70. They claimed that these provisions violate the ADEA. The Equal Employment Opportunity Commission (EEOC) subsequently intervened to support the six plaintiffs.

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[3] Title 5 U. S. C. § 8335(b) provides:

"A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires."

Until 1962, all Baltimore employees, including firefighters, were covered by the Employees Retirement System (ERS), which provided for mandatory retirement at age 70. App. 4. In 1962, the city established the Fire and Police Employee Retirement System (FPERS), which generally requires that all firefighting personnel below the rank of lieutenant retire at age 55. See FPERS, Baltimore City Code, Art. 22, § 34(a) 1–4 (1983); App. 3. Lieutenants and other higher ranking officers may work until age 65. *Ibid.* When the FPERS was implemented in 1962, special provision was made for personnel hired before 1962, who were given the option of remaining in the ERS or transferring to the FPERS under a special grandfather provision. Firefighters hired before 1962 who chose to remain in the ERS may continue to work until age 70 even today. See 515 F. Supp. 1287, 1297, n. 10 (Md. 1981). Firefighters hired before 1962 who are covered by the newer FPERS may work until age 60 or, in some limited circumstances, until age 65. *Ibid.* The plaintiffs here include five firefighters covered by this grandfather clause who are subject to retirement at age 60, and one firefighter hired after 1962, who is subject to retirement at age 55.

The city[4] asserted as an affirmative defense that age is a BFOQ for the position of firefighter and that the mandatory retirement provision therefore was permissible under the ADEA. After a 6-day bench trial, at which each side presented expert and nonexpert testimony on the validity of the BFOQ defense, the District Court held that the city had failed to produce sufficient evidence to make out its BFOQ defense.[5] The court considered both the particular condi-

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[4] The defendants were the Mayor and City Council of Baltimore and the Chairman and members of the Board of Trustees of the Fire and Police Employees Retirement System of the city of Baltimore. We refer to these defendants collectively as the "city."

[5] Plaintiffs did not argue that a retirement age of 65 would violate the ADEA but instead essentially sought the same retirement age applicable

tion of the plaintiff firefighters and the general operation of the Baltimore Fire Department, noting that "historically Baltimore firemen have always worked past [age 60] and even up to age seventy," 515 F. Supp., at 1297. It then applied the two-pronged test developed by the Court of Appeals for the Fifth Circuit in *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976), and adopted by the Fourth Circuit.[6] The trial court concluded that the city had shown neither that "there is a factual basis for [it] to believe that all or substantially all Baltimore City firefighters between the ages of sixty and sixty-five, other than officers, would be unable to perform their job safely and efficiently," 515 F. Supp., at 1296, nor that "it is impossible or impractical to deal with firefighters between sixty and sixty-five on an individualized basis." *Ibid.* The court therefore struck down the city's mandatory retirement plan for firefighters.

A divided panel of the Court of Appeals for the Fourth Circuit reversed. 731 F. 2d 209 (1984). The majority did not take issue with the District Court's findings that the city had failed to prove that age was a BFOQ for firefighters. Instead, the court held that the city was entitled to the BFOQ defense as a matter of law. To reach that conclusion, the appellate court relied on language from this Court's decision in *EEOC* v. *Wyoming*, 460 U. S. 226 (1983), in which we upheld the constitutionality of Congress' extension of the ADEA to state and local governments. In that decision we observed

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to lieutenants. The case therefore presented only the question whether mandatory retirement prior to age 65 violates the ADEA.

[6] The District Court required the city to show (1) that the BFOQ it invokes "'is reasonably necessary to the essence of its business' of operating an efficient fire department within the City of Baltimore, and (2) that defendants have 'reasonable cause, *i. e.*, a factual basis for believing that all or substantially all persons within the class . . . would be unable to perform safely and efficiently the duties of the job involved, or that it is impossible or impractical to deal with persons over the age limit on an individualized basis.'" 515 F. Supp., at 1295 (quoting *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (CA4 1977)).

that the ADEA tests a State's discretion to impose a mandatory retirement age "against a reasonable federal standard." *Id.*, at 240. The Court of Appeals undertook a "search for a 'reasonable federal standard'" by which to test the asserted BFOQ; it found that standard in the federal civil service statute, 5 U. S. C. § 8335(b), which generally requires federal firefighters to retire at age 55. See n. 3, *supra*. The court held that, because Congress has selected age 55 as the retirement age for most federal firefighters, as a matter of law the same age constitutes a BFOQ for all state and local firefighters as well. Therefore, the court concluded, the city was not required to make any factual showing at trial as to its need for the mandatory retirement age.[7]

Because this case presents serious questions about the administration of the ADEA, we granted certiorari to review the decision of the Court of Appeals. 469 U. S. 1156 (1985). We now reverse.

B

EEOC v. *Wyoming* arose out of a lawsuit filed by a Wyoming state game warden who was required under state law to retire at age 55. He brought an action against the State and various of its officials claiming that its mandatory requirement violated the ADEA. The District Court held that the ADEA violated the Tenth Amendment insofar as it regulated Wyoming's employment relationship with its game wardens and other law enforcement officers and dismissed the suit. In rejecting that argument, we explained that the ADEA did not unduly intrude into the exercise of governmental func-

[7] Chief Judge Winter dissented. He rejected the panel's conclusion that the civil service provision necessarily constituted a congressional determination that age 55 is a BFOQ for federal firefighters but asserted that even if it were a BFOQ for federal firefighters, that fact would not excuse the city from proving facts necessary to establish a BFOQ under 29 U. S. C. § 623(f)(1). Concluding that the District Court's factual findings on the city's proof were not clearly erroneous, he would have affirmed the District Court.

tions because it did not require employers to retain unfit employees, but only at most to make more individualized determinations about fitness. Moreover, we noted that, in light of the BFOQ defense, States might in fact remain free from the obligation even to make more individualized showings:

> "Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden. . . . Thus, . . . even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard." 460 U. S., at 240 (emphasis in original).

We remanded to give Wyoming an opportunity to prove at trial that age 55 was in fact a BFOQ for Wyoming game wardens.

In this case, the Court of Appeals interpreted our use of the term "reasonable federal standard" in the quoted passage to mean that the question whether an age limit for nonfederal employees is permissible under the ADEA may be resolved simply by reference to a federal statute establishing a retirement age for a class of federal employees. It seized on the retirement provisions of the federal civil service statute, which require that federal firefighters retire at age 55. Then, without considering the intent underlying that provision, it held that, as a matter of law, age must therefore be a BFOQ for local firefighters.

The "reasonable federal standard" to which we referred in *EEOC* v. *Wyoming*, however, is the standard supplied by the ADEA itself—that is, whether the age limit is a BFOQ. By use of that phrase, we intended only to reaffirm that the BFOQ standard permits an employer to maintain a mandatory retirement age as long as the employer makes the requisite showing that age is a BFOQ. Nothing in the ADEA or

our decision in *Wyoming* warrants the conclusion that a federal rule, not found in the ADEA, and by its terms applicable only to federal employees, *necessarily* authorizes a state or local government employer to maintain a mandatory retirement age as a matter of law. To make the fact that the Federal Government has imposed a mandatory age limit on its own firefighters automatically dispositive of the question whether the same age limit is appropriate for state and local officers, without in any way examining the provision, would extend the federal rule far beyond its scope. It would apply to state and local employees a statute applicable by its terms only to federal officers. The mere fact that some federal firefighters are required to cease work at age 55 does not provide an absolute defense to an ADEA action challenging state and local age limits for firefighters.

The Court of Appeals in this case failed to focus on the city's factual showing and instead centered its attention on the federal retirement provisions of the United States Code. We would be remiss, in light of Congress' indisputable intent to permit deviations from the mandate of the ADEA only in light of a particularized, factual showing, see H. R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967); Legislative History 80; S. Rep. No. 723, 90th Cong., 1st Sess., 7 (1967); Legislative History 111,[8] to permit nonfederal employers to circumvent this plan by mere citation to an unrelated statutory provision that is not even mentioned in the ADEA.

II

The city, supported by several *amici*, argues for affirmance nonetheless. It asserts first that the federal civil

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[8] To this end, the lower courts have fashioned tests for finding a BFOQ that focus, first, on the individual employer's need for an age limit, and, second, on the factual basis for his belief that all workers above a certain age are not qualified and on his proof that individual testing is highly impractical. We have today elaborated on the precise standard to be applied. *Western Air Lines, Inc.* v. *Criswell*, *post*, at 412–417.

service statute is not just a federal retirement provision unrelated to the ADEA but *in fact* establishes age as a BFOQ for federal firefighters based on factors that properly go into that determination under the ADEA, see *Western Air Lines, Inc.* v. *Criswell*, *post*, p. 400. Second, the city asserts, a congressional finding that age is a BFOQ for a certain occupation is dispositive of that determination with respect to nonfederal employees in that occupation. We consider each of these contentions in turn.

A

We must first resolve whether the age-55 retirement for federal firefighters reflects a congressional determination that age 55 is a BFOQ within the meaning of the ADEA, as the city urges, or whether Congress established the mandatory retirement age based on an analysis different from that mandated by the BFOQ standard. On this question, the statute is silent. Section 8335(b), the federal civil service provision, does not by its terms or history evince an intent to cover nonfederal employees, or to limit the scope of the ADEA. Nor does the ADEA, which was passed later, cross-reference the civil service statute or in any way express a congressional desire to exempt any firefighters from the full effect of the Act's reach.[9] In other words, in the language of neither statute has Congress indicated that the civil service provision reflects anything more than a congressional decision that federal firefighters must retire, as a general matter, at the age of 55.

The history of the civil service provision, however, makes clear that the decision to retire certain federal employees at an early age was not based on BFOQs for the covered em-

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[9] Recently, legislation to exempt state and local firefighters and law enforcement officers from the ADEA has been introduced in both the Senate and the House of Representatives. See S. 698, 99th Cong., 1st Sess. (introduced March 20, 1985); H. R. 1435, 99th Cong., 1st Sess. (introduced March 6, 1985).

ployment. This history demonstrates instead that Congress has acted to deal with the idiosyncratic problems of federal employees in the federal civil service. The Federal Government first introduced early retirement for certain employees in 1947 with passage of legislation *permitting* investigatory personnel of the Federal Bureau of Investigation to retire at age 50 at an enhanced annuity. Act of July 11, 1947, ch. 219, 61 Stat. 307. Congress in 1948 extended this program to anyone whose duties for at least 20 years were primarily the investigation, apprehension, or detention of persons suspected or convicted of federal criminal law violations, see Act of July 2, 1948, ch. 807, 62 Stat. 1221. In 1972, this voluntary retirement provision was further extended to federal firefighters. See Act of Aug. 14, 1972, Pub. L. 92–382, 86 Stat. 539.

The provision as initially passed was intended only to give certain employees the option to retire early. It was designed in part as an "added stimulus to morale in the Federal Bureau of Investigation . . . [to] stabilize the service of the Federal Bureau of Investigation into a career service. . . . [and to] act as an incentive to investigative personnel of the [FBI] to remain in the Federal service until a reasonable retirement age is reached." S. Rep. No. 76, 80th Cong., 1st Sess., 1–2 (1947). In addition, as then Attorney General Tom C. Clark explained, the Department of Justice sought to maintain the FBI "as a 'young man's service.'" He added that "men in their 60's and 70's, forced to remain in the service, faced with the rigors of arduous service demanded of special agents and others, [should not be] forced to carry on for lack of an adequate retirement plan to fit the needs of the FBI service." *Id.*, at 2.

In 1974, Congress amended the statute to provide that these same federal employees *must* retire at age 55 if they had completed 20 years of service, and it provided an enhanced annuity. As with the voluntary retirement scheme, one goal of the 1974 amendment was to maintain "relatively

young, vigorous, and effective law enforcement and firefighting workforces." H. R. Rep. No. 93–463, p. 2 (1973). The amendment also was designed to replace the existing provision, which was having an adverse impact on the quality of older federal employees, because "most of those who retire in their early fifties are the more alert and aggressive employees who have found desirable jobs outside of Government," *id.*, at 3; in contrast, the newer mandatory scheme would enable management to "retire, without stigma, one who suffers a loss of proficiency." Retirement for Certain Hazardous Duty Personnel: Hearing on H. R. 6078 and H. R. 9281 before the Subcommittee on Compensation and Employment Benefits of the Senate Committee on Post Office and Civil Service, 93d Cong., 2d Sess., 134 (1974) (testimony of Rep. Brasco, sponsor of House bill).

Congress undoubtedly sought in significant part to maintain a youthful work force and took steps through the civil service retirement provisions to make early retirement both attractive and financially rewarding. However, neither the language of the 1974 amendment nor its legislative history offers any indication why Congress wanted to maintain the image of a "young man's service," or why Congress thought that 55 was the proper cutoff age, or whether Congress believed that older employees in fact could not meet the demands of these occupations. Indeed, Congressmen who opposed the bill voiced their concern for the singling out of one group of employees for preferential treatment through enhanced annuities and early retirement, and did not even acknowledge that the exigencies of the job might have anything to do with Congress' willingness to accord special treatment to a group of employees. H. R. Rep. No. 93–463, *supra*, at 20. Moreover, the allowance that firefighters who had not yet served for 20 years could remain in their jobs, see *id.*, at 6, along with other exceptions to the general rule of retirement, casts serious doubt on any argument that Congress in fact believed that either the employee or

the public would be jeopardized by the employment of older firefighters.

The absence of any indication that Congress established the age limit based on the demands of the occupation raises the possibility that the federal rule is merely "an example of the sort of age stereotyping without factual basis that was one of the primary targets of the reforms of the ADEA," Brief for Petitioner in No. 84–710, p. 38, and surely belies any contention that the age limit is based on actual occupational qualifications. Without knowing whether Congress passed the statute based on factual support, legislative balancing of competing policy concerns, or stereotypical assumptions, we simply have no way to decipher whether it is consistent with the policies underlying the ADEA.[10]

Congress' treatment of the civil service provision when it extended the ADEA to federal employees in 1978 conclusively demonstrates that the retirement statute does not

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[10] Congress, of course, may exempt federal employees from application of the ADEA and otherwise treat federal employees, whose employment relations it may directly supervise, differently from those of other employers, see, *e. g.*, 26 U. S. C. § 3306(c)(6) (unemployment compensation not applicable to federal employees); 29 U. S. C. § 152(2) (exempting federal employees from labor relations legislation); indeed it has done so elsewhere in the ADEA. While Congress at first exempted federal employees from the reach of the Act, it now applies even more protective rules to older federal employees than it imposes on other employers. See 29 U. S. C. §§ 631(a), 631(b) (federal employees generally cannot be forced to retire at any age, while similarly situated nonfederal employees may be forced to retire at age 70). It might be that congressional findings leading to the conclusion that age is a BFOQ for a certain federal occupation would be of relevance to a judicial inquiry into age as a BFOQ for other employers, even absent express congressional direction on this point. See *infra*. But this relevance derives from a recognition that Congress might already have engaged in the same inquiry that a district court must make, and a district court might find congressionally gathered evidence useful and congressional factfinding persuasive. Contrary to the suggestion of the Court of Appeals, 731 F. 2d 209, 212–213 (CA4 1984), Congress is not always required to treat federal and nonfederal employees in the same way.

represent a congressional determination that age is an occupational qualification for federal firefighters. The decision to retain mandatory retirement provisions for certain federal employees resulted not from a finding that the provisions met the standards of the ADEA, but rather from an agreement to provide to the congressional Committees with jurisdiction over the retirement programs at issue the opportunity to review those provisions. Instead of delaying passage of the ADEA while those Committees studied the mandatory retirement provisions in light of the proposed ADEA, Congress decided to preserve the status quo with respect to the retirement program, pending further study. This express purpose definitively rules out any conclusion that Congress approved the retirement programs in light of the ADEA.

As first reported out of Committee in 1977, the 1978 Amendments to the ADEA removed all age limitations on federal employment, *"notwithstanding any other provisions of Federal law relating to mandatory retirement requirements. . . ."* H. R. 5383, 95th Cong., 1st Sess., 5 (1977); Legislative History 396. Representative Nix, Chairman of the House Post Office and Civil Service Committee, thereafter expressed concern that the "broad general language" of the proposed bill would repeal various statutory provisions within the primary jurisdiction of his Committee. See 123 Cong. Rec. 29003–29004 (1977) (letter to Rep. Perkins, Chairman of the House Committeee on Education and Labor); Legislative History 400–401. He suggested that his colleagues' desire to expedite consideration of the bill could be accommodated through an amendment eliminating provisions of concern to his Committee. *Ibid.* This proposal met with approval, see *ibid.*, and accordingly, Representative Spellman offered an amendment, on behalf of the House Post Office and Civil Service Committee, to retain the mandatory retirement provisions applicable to certain specific federal occupations, including law enforcement officials and firefighters. See 123 Cong. Rec. 29002 (1977) (statement of Rep. Hawkins); Legis-

lative History 399. In so doing, Representative Spellman stated:

> "I hasten to point out that this amendment does not indicate opposition perse *[sic]* to elimination of mandatory retirement for air traffic controllers, firefighters, and other specific occupations.
>
> "However, since most of these mandatory retirement provisions are part of the liberalized retirement programs, our committee believes that such provisions should not be repealed until the individual retirement programs have been reexamined." 123 Cong. Rec. 30556 (1977); Legislative History 415.

Similarly, Representative Pepper, a sponsor of the 1978 Amendments, made clear:

> "For the record, Mr. Chairman, I should state what might appear to be obvious: That we in the House, in debating and passing this amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement. That judgment, I am sure, will be rendered when the committees involved bring subsequent legislation to the floor." *Ibid.*

And again, Representative Hawkins, Chairman of the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, stated that "[t]he sole purpose of this agreement is to afford the committees the opportunity to review these statutes." *Ibid.* The mandatory retirement provisions were, accordingly, retained when the 1978 Amendments were enacted. See Pub. L. 95–256, § 5(c), 92 Stat. 191; see also H. R. Conf. Rep. No. 95–950, pp. 10–11 (1978); Legislative History 521–522.[11]

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[11] Thereafter, Representative Spellman's Subcommittee held hearings on the retirement provisions of 5 U. S. C. § 8335(b) and heard testimony on the mandatory provision. Special Retirement Policies for Law Enforce-

In sum, almost four decades of legislative history establish that Congress at no time has indicated that the federal retirement age for federal firefighters is based on a determination that age 55 is a BFOQ within the meaning of the ADEA. Congress adopted what might well have been an arbitrarily designated retirement age in an era not concerned with the pervasive discrimination against the elderly that eventually gave rise to the ADEA. Thereafter, although Congress retained mandatory limitations in 1978, while questioning whether they continued to make good policy sense, it did so for the sake of expediency alone. On considering the language and history of the civil service provision, we find it quite possible that factors other than conclusive determinations of occupational qualifications might originally have

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ment Officers and Firefighters: Hearings before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977); Hearings on H. R. 7945 before the Subcommittee on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess. (1977). The Subcommittee also considered a report of the General Accounting Office, which found that "[r]etirement policies that disregard difference in physical abilities and productive capacity are costly and wasteful." Report to the House Committee on Post Office and Civil Service by the Comptroller General of the United States: Special Retirement Policy for Federal Law Enforcement and Firefighter Personnel Needs Reevaluation 10 (1977). The Subcommittee took no action to change the mandatory rules.

More recently, Congress has again been confronted with a Report suggesting that mandatory age limits for law enforcement personnel are unnecessary and wasteful. The Report, published by the House Select Committee on Aging, states that "it is impossible to justify mandatory retirement or maximum hiring age policies based on arguments of public safety or job-related performance." Chairman, House Select Committee on Aging, The Myths and Realities of Age Limits for Law Enforcement and Firefighting Personnel, 98th Cong., 2d Sess., IV (Comm. Print 1984). Legislation also has been introduced in the House to eliminate mandatory retirement for all federal employees not currently covered by the ADEA, including firefighters. H. R. 1710, 99th Cong., 1st Sess. (introduced March 25, 1985).

led to passage of this federal rule, and that the reason for its retention after 1978 further undercuts any argument that Congress has determined that age is a BFOQ for federal firefighters.

In the absence of an indication that Congress in fact grounded the age limit on occupational qualifications, we will not presume that it did so intend. The myriad political purposes for which Congress might properly make decisions affecting federal employees, and that body's uncontested authority to exempt federal employees from the requirements of federal regulatory statutes, simply do not permit the conclusion that Congress passed or retained this retirement provision because it reflects BFOQs.[12] We therefore conclude that this civil service provision does not articulate a BFOQ for firefighters, that its presence in the United States Code is not relevant to the question of a BFOQ for firefighters, and that it would be error for a court, faced with a challenge under the ADEA to an age limit for firefighters, to give any weight, much less conclusive weight, to the federal retirement provision.

B

Were there evidence that Congress in fact determined that a class of federal employees must retire early based on the same considerations that support a finding of a BFOQ under the Act, the situation might differ. Of course, if Congress expressly extended the BFOQ to nonfederal oc-

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[12] Nor do we have any reason to believe that, when the city imposed its mandatory retirement scheme in 1962, it was relying on a congressional determination of any kind. The history of the civil service provision up to that time reveals no congressional finding of an occupational qualification, and in fact in 1962 the congressional scheme remained completely voluntary. It was not until 1974 that Congress even rendered early retirement mandatory. Indeed, the city pointed out to the Court of Appeals that it instituted its mandatory retirement plan "more than a decade before the federal government did likewise." Answer of Appellant City to Petition for Rehearing with Suggestion for Rehearing en Banc in No. 81–1965 (CA4), pp. 9–10.

cupations, that determination would be dispositive. But if it did not, the federal exemption nevertheless might be relevant to an appropriate employer when deciding whether to impose a mandatory retirement age, and to a district court engaged in reviewing an employer's BFOQ defense. The evidence Congress has considered, and the conclusions it has drawn therefrom, might be admissible as evidence in judicial proceedings to determine the existence of a BFOQ for nonfederal employees. The extent to which these factors are probative would, of course, vary depending at least on the congruity between the federal and nonfederal occupations at issue. Indeed, the need to consider the actual tasks of the nonfederal employees and the circumstances of employment, in order to determine the extent to which congressional conclusions about federal employees in fact are relevant, would preclude the kind of wholesale reliance on the federal rule that the city suggests. See *supra*, at 362–363. Because in this case the evidence supports no such finding of congressional intent to establish a BFOQ, however, we decline to speculate on the manner in which a different federal rule might affect nonfederal employment.

III

We accordingly reverse the Court of Appeals' holding that the federal retirement provision at issue in this case provides an absolute defense in an ADEA action. We remand to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

BALDWIN *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 84–5743. Argued March 27, 1985—Decided June 17, 1985

Alabama's 1975 Death Penalty Act (later repealed) required a jury that convicted a defendant of any one of a number of specified aggravated crimes to "fix the punishment at death." However, the "sentence" fixed by the jury was not dispositive, because the Act provided that "[n]otwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances" brought out at a required sentencing hearing, could refuse to accept the death penalty and, instead, could impose a life sentence, or, after weighing such circumstances, "and the fixing of the punishment at death by the jury," could sentence the defendant to death. Petitioner was convicted under the Act of a specified capital offense, and the jury's verdict fixed his punishment at death. After conducting the required sentencing hearing and weighing the aggravating and mitigating circumstances, the judge accepted the death penalty as fixed by the jury. The Alabama Supreme Court ultimately affirmed the conviction and sentence, rejecting petitioner's contention that the Act was facially unconstitutional. The court held that even though the jury had no discretion regarding the "sentence" it would impose, the sentencing procedure was saved by the fact that it was the trial judge who was the true sentencing authority, and he considered aggravating and mitigating circumstances before imposing sentence.

Held: Alabama's requirement that the jury return a "sentence" of death along with its guilty verdict did not render unconstitutional the death sentence the trial judge imposed after independently considering petitioner's background and character and the circumstances of his crime. Pp. 379–389.

(a) Although the Alabama scheme would have been unconstitutional if the jury's mandatory death "sentence" were dispositive, there is no merit to petitioner's contention that the trial judge's sentence was unconstitutional because the Act required the judge to consider, and accord some deference to, the jury's "sentence." While the Act's language did not expressly preclude, and might seem to have authorized, the sentencing judge's consideration of the jury's "sentence" in determining whether the death penalty was appropriate, the Alabama appellate courts have interpreted the Act to mean that the sentencing judge was to impose a sentence without regard to the jury's mandatory "sentence." More-

over, it was clear that the sentencing judge here did not interpret the statute as requiring him to consider the jury's "sentence," because he never described the "sentence" as a factor in his deliberations. Pp. 382–386.

(b) Nor is there merit to the contention that a trial judge's decision to impose the death penalty *must* have been swayed by the fact that the jury returned a "sentence" of death. *Beck* v. *Alabama*, 447 U. S. 625, distinguished. The judge knew that determination of the appropriate sentence was not within the jury's province, and that the jury did not consider evidence in mitigation in arriving at its "sentence." Pp. 386–389.

456 So. 2d 129, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in the judgment, *post*, p. 390. BRENNAN, J., filed a dissenting opinion, *post*, p. 392. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 393.

John L. Carroll argued the cause and filed a brief for petitioner.

Edward E. Carnes, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the brief was *Charles A. Graddick*, Attorney General.

JUSTICE BLACKMUN delivered the opinion of the Court.

Between 1976 and 1981, an Alabama statute required a jury that convicted a defendant of any one of a number of specified crimes "with aggravation" to "fix the punishment at death." Ala. Code § 13–11–2(a) (1975).[1] The "sentence"

[1] The originating statute was 1975 Ala. Acts, No. 213, effective March 7, 1976. Act No. 213 was enacted in response to this Court's decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972), and revised the State's death-penalty statutes. Chapter 11 of Title 13 of the Alabama Code, as it thereafter stood, was repealed in its entirety and replaced by new death-penalty provisions set forth in 1981 Ala. Acts, No. 81–178, effective July 1, 1981. The repeal did not moot the present case because petitioner's offense was committed and his sentence was imposed in 1977 while the 1975 Act was in effect. See 1981 Ala. Acts, §§ 19 and 20, codified as Ala. Code, § 13A–5–57 (1982).

imposed by the jury, however, was not dispositive. Instead, "[n]otwithstanding the fixing of the punishment at death by the jury," § 13–11–4, the trial judge then was to hear evidence of aggravating and mitigating circumstances and, after weighing those circumstances, to sentence the defendant to death or to life imprisonment without parole.

This case concerns the constitutionality of the peculiar and unusual requirement of the 1975 Alabama Act that the jury "shall fix the punishment at death," even though the trial judge is the actual sentencing authority.[2] The United States Court of Appeals for the Eleventh Circuit ruled that the scheme was facially unconstitutional. *Ritter* v. *Smith*, 726 F. 2d 1505, 1515–1517, cert. denied, 469 U. S. 869 (1984). Shortly thereafter, however, the Supreme Court of Alabama, with two dissenting votes, ruled to the contrary in the present case. *Ex parte Baldwin*, 456 So. 2d 129, 138–139 (1984). We granted certiorari to resolve this significant conflict. 469 U. S. 1085 (1984).

I

A

The facts are sordid, but a brief recital of them must be made. Petitioner Brian Keith Baldwin, then 18 years of age, escaped from a North Carolina prison camp on Saturday, March 12, 1977. That evening, he and a fellow escapee, Edward Horsley, came upon 16-year-old Naomi Rolon, who was having trouble with her automobile. The two forcibly took over her car and drove her to Charlotte, N. C. There, both men attempted to rape her, petitioner sodomized her, and the two attempted to choke her to death. They then ran over her with the car, locked her in its trunk, and left

[2] Our own research has disclosed no other death-penalty statute currently in effect that *requires* the jury to return a death "sentence," but then has the judge make the actual sentencing decision. Indeed, as is noted herein, Alabama has changed its death-penalty scheme and no longer has the requirement.

her there while they drove through Georgia and Alabama. Twice, when they heard the young woman cry out, they stopped the car, opened the trunk, and stabbed her repeatedly. On Monday afternoon, they stole a pickup truck, drove both vehicles to a secluded spot, and, after again using the car to run over the victim, cut her throat with a hatchet. She died after this 40-hour ordeal.

Petitioner was apprehended the following day driving the stolen truck. He was charged with theft. While in custody, he confessed to the victim's murder and led the police to her body. He was then indicted for "robbery . . . when the victim is intentionally killed," a capital offense, § 13–11–2(a)(2), and was tried before a jury in Monroe County. At the close of the evidence regarding guilt or innocence, the judge instructed the jury that if it found the petitioner guilty, "the Legislature of the State of Alabama has said this is a situation [in] which . . . the punishment would be death by electrocution," Tr. 244–245, and the jury therefore would be required to sentence petitioner to death. *Id.*, at 242. The jury found petitioner guilty, in the terms of the statute, of robbery with the aggravated circumstance of intentionally killing the victim, and returned a verdict form that stated: "We, the Jury, find the defendant guilty as charged in the indictment and fix his punishment at death by electrocution." App. 4.

B

Under Alabama's 1975 Death Penalty Act, once a defendant was convicted of any one of 14 specified aggravated offenses, see Ala. Code § 13–11–2(a) (1975), and the jury returned the required death sentence, the trial judge was obligated to hold a sentencing hearing:

> "[T]he court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to

> sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13–11–6 and 13–11–7." § 13–11–3.

The judge was then required to sentence the defendant to death or to life imprisonment without parole:

> "Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death." § 13–11–4.

If the court imposed a death sentence, it was required to set forth in writing the factual findings from the trial and the sentencing hearing, including the aggravating and mitigating circumstances that formed the basis for the sentence. *Ibid.* The judgment of conviction and sentence of death were subject to automatic review by the Court of Criminal Appeals, and, if that court affirmed, by the Supreme Court of Alabama. §§ 13–11–5, 12–22–150; Ala. Rule App. Proc. 39(c). See *Beck* v. *State*, 396 So. 2d 645, 664 (Ala. 1981); *Evans* v. *Britton*, 472 F. Supp. 707, 713–714, 723–724 (SD Ala. 1979), rev'd on other grounds, 628 F. 2d 400 (CA5 1980), 639 F. 2d 221 (1981), rev'd *sub nom. Hopper* v. *Evans*, 456 U. S. 605 (1982).

C

Following petitioner's conviction, the trial judge held the sentencing hearing required by § 13–11–3. The State reintroduced the evidence submitted at trial, and introduced petitioner's juvenile and adult criminal records, as well as Edward Horsley's statement regarding the crime. Petitioner then took the stand and testified that he had "a hard

time growing up"; that he left home at the age of 13 because his father did not like him to come home late at night; that he dropped out of school after the ninth grade; that he made a living by "street hustling"; that he had been arrested approximately 30 times; and that he was a drug addict. App. 8–10. At the conclusion of petitioner's testimony, the trial judge stated:

> "Brian Keith Baldwin, today is the day you have in court to tell this judge whatever is on your mind . . . , now is your time to tell the judge anything that you feel like might be helpful to you in the position that you find yourself in. I want to give you every opportunity in the world that I know about. . . . Anything you feel like you can tell this Judge that will help you in your present position." *Id.*, at 12.

Petitioner then complained about various aspects of his trial, and concluded: "I ain't saying I'm guilty but I might be guilty for murder but I ain't guilty for robbery down here. That's all I got to say." *Id.*, at 13.

The judge stated that "having considered the evidence presented at the trial and at said sentence hearing," *id.*, at 17–18, the court found the following aggravating circumstances: the capital offense was committed while petitioner was under a sentence of imprisonment in the State of North Carolina from which he had escaped; petitioner previously had pleaded guilty to a felony involving the use of violence to the person; the capital offense was committed while petitioner was committing a robbery or in flight after the robbery; and the offense was especially heinous, atrocious, or cruel.[3] The judge found that petitioner's age—18 at the

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[3] The sentencing judge found, as an additional aggravating factor, that petitioner had been adjudged delinquent in juvenile proceedings after being charged with kidnaping and rape. The Alabama Court of Criminal Appeals ruled that the delinquency adjudication was not valid as an aggravating circumstance, but held that the judge's consideration of it was

time of the crime—was the only mitigating circumstance. *Id.*, at 18. He then stated:

> "The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances, it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted." *Ibid.*

The Supreme Court of Alabama eventually affirmed the conviction and sentence. 456 So. 2d 129 (1984).[4] In his argument to that court, petitioner contended that the 1975 Act was facially invalid. Tracking the reasoning of the Eleventh Circuit in *Ritter* v. *Smith*, 726 F. 2d, at 1516–1517, he argued that the jury's mandatory sentence was unconstitutional because it was unguided, standardless, and reflected no consideration of the particular defendant or crime, and that the judge's sentence was unconstitutional because it was based in part upon consideration of the impermissible jury sentence and was infected by it. The court rejected petitioner's argu-

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harmless error. 456 So. 2d 117, 125–128 (1983), aff'd, 456 So. 2d 129 (Ala. 1984). That issue was not raised in the petition for certiorari here, and we have no reason to consider it.

[4] Petitioner's conviction and sentence were affirmed initially by the Alabama Court of Criminal Appeals, 372 So. 2d 26 (1978), and by the Supreme Court of Alabama, 372 So. 2d 32 (1979). This Court, however, 448 U. S. 903 (1980), vacated and remanded the case for reconsideration in the light of *Beck* v. *Alabama*, 447 U. S. 625 (1980), which held unconstitutional a clause in Alabama's 1975 Act that precluded the jury from considering lesser included noncapital offenses. On remand, the Court of Criminal Appeals reversed the judgment of conviction on the basis of *Beck*. 405 So. 2d 699 (1981). After this Court ruled that due process requires a lesser included offense instruction only when warranted by the evidence, *Hopper* v. *Evans*, 456 U. S. 605 (1982), the Court of Criminal Appeals granted rehearing, rescinded its earlier reversal, and reaffirmed petitioner's conviction and sentence. 456 So. 2d 117 (1983). The Supreme Court of Alabama affirmed that decision, 456 So. 2d 129 (1984), and it is that judgment which we now review.

ments, holding that even though the jury had no discretion regarding the "sentence" it would impose, the sentencing procedure was saved by the fact that it was the trial judge who was the true sentencing authority, and he considered aggravating and mitigating circumstances before imposing sentence. 456 So. 2d, at 139.[5]

II

If the jury's "sentence" were indeed the dispositive sentence, the Alabama scheme would be unconstitutional under the principles announced in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), and *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976) (plurality opinion). See

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[5]The Court of Criminal Appeals, as has been noted in the text, must review the decision of a trial court that imposes the death penalty, § 12–22–150, and if that court affirms the sentence, certiorari review by the Supreme Court of Alabama is automatic. Ala. Rule App. Proc. 39(c). Both appellate courts "review . . . the aggravating and mitigating circumstances found in the case by the trial judge" and independently weigh those circumstances to determine whether the imposition of a death sentence is appropriate. *Jacobs* v. *State*, 361 So. 2d 640, 647 (Ala. 1978) (Torbert, C. J., concurring in part and dissenting in part), cert. denied, 439 U. S. 1122 (1979); see also *Beck* v. *State*, 396 So. 2d. 645, 664 (Ala. 1981). In reviewing petitioner's sentence, neither appellate court gave any indication of including the jury's "sentence" in the weighing. In describing its review of petitioner's sentence, the Court of Criminal Appeals stated:

"We have reviewed the aggravating and mitigating circumstances set out in the record and the trial court's findings relative to those circumstances. . . . After review of the hearing on aggravating and mitigating circumstances, we find no error on the part of the trial court in reaching the conclusion that the aggravating circumstances far outweigh the mitigating circumstances in this case. The sentence fits the crime." 372 So. 2d, at 32.

Upon reaffirming petitioner's conviction in light of *Hopper* v. *Evans*, 456 U. S. 605 (1982), the Court of Criminal Appeals again noted its obligation to weigh independently the aggravating and mitigating circumstances, and found that petitioner's death sentence was appropriate. 456 So. 2d, at 128. The State Supreme Court also found that the "aggravating circumstances greatly outweighed the mitigating circumstances." 456 So. 2d, at 140.

also *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977). In *Woodson*, the Court held that North Carolina's sentencing scheme, which imposed a mandatory death sentence for a broad category of homicidal offenses, violated the Eighth and Fourteenth Amendments in three respects. First, such mandatory schemes offend contemporary standards of decency, as evidenced by the frequency with which jurors avoid the imposition of mandatory death sentences by disregarding their oaths and refusing to convict, and by the consistent movement of the States and Congress away from such schemes. 428 U. S., at 288–301. Second, by refusing to convict defendants who the jurors think do not deserve the death penalty, juries exercise unguided and unchecked discretion regarding who will be sentenced to death. *Id.*, at 302–303. Third, such mandatory schemes fail to allow particularized consideration of the character and record of the defendant and the circumstances of the offense. *Id.*, at 303–305. Alabama's requirement that the jury impose a mandatory sentence for a wide range of homicides, standing alone, would suffer each of those defects.

The jury's mandatory "sentence," however, does not stand alone under the Alabama scheme. Instead, as has been described above, the trial judge thereafter conducts a separate hearing to receive evidence of aggravating and mitigating circumstances, and determines whether the aggravating circumstances outweigh the mitigating circumstances. The judge's discretion is guided by the requirement that the death penalty be imposed only if the judge finds the aggravating circumstance that serves to define the capital crime—in this case the fact that the homicide took place during the commission of a robbery—and only if the judge finds that the definitional aggravating circumstance, plus any other specified aggravating circumstance,[6] outweighs

[6] See § 13–11–6. The 1975 Act required the judge to weigh aggravating circumstances specified in § 13–11–6 against mitigating circumstances. The Alabama courts interpreted the Act, however, to require the judge to

any statutory and nonstatutory mitigating circumstances. § 13–11–4. Petitioner accordingly does not argue that the judge's discretion under § 13–11–4 is not "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Nor is there any issue before this Court that the 1975 Act did not allow "the type of individualized consideration of mitigating factors" by the sentencing judge that has been held constitutionally indispensable in capital cases.[7] *Lockett* v. *Ohio*, 438 U. S. 586, 606 (1978) (plurality opinion); see also

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find the presence of the § 13–11–2(a) definitional aggravating circumstance (in other words, to agree with the jury's finding that the defendant is guilty of the offense charged in the indictment) before weighing any § 13–11–6 aggravating circumstances against mitigating circumstances. *Ex parte Kyzer*, 399 So. 2d 330 (Ala. 1981). Generally, the definitional aggravating circumstances of § 13–11–2(a) have counterparts in § 13–11–6. Where there is no counterpart, the judge must find the definitional aggravating circumstance or no death sentence can be imposed, even though § 13–11–6 aggravating circumstances outweigh mitigating circumstances. 399 So. 2d, at 337.

[7] In his statement of facts, petitioner asserts that the sentencing judge limited his consideration of mitigating circumstances to those specified by § 13–11–7, in violation of *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). That issue was not addressed by the Supreme Court of Alabama in the decision under review, and was not raised in the petition for certiorari. We have no reason to consider the issue here. We note, however, that in its first review of petitioner's sentence, the Court of Criminal Appeals held that petitioner "was given the opportunity to present *any* mitigating circumstance" (emphasis supplied), and that the 1975 Act did not preclude consideration of any aspect of petitioner's character or of the circumstances of the offense. 372 So. 2d, at 32. We already have noted that the sentencing judge asked petitioner to "tell the judge anything that you feel like might be helpful to you in the position that you find yourself in." App. 12. Petitioner's counsel three times asked petitioner while he was on the stand if there was "anything else you would like for the judge to know or to be able to tell him at this point?" *Id.*, at 10–11. Finally, at the conclusion of petitioner's testimony, the judge asked petitioner's counsel if he had "anything else that you might be able to offer in the way of mitigating circumstances." *Id.*, at 14.

Eddings v. *Oklahoma*, 455 U. S. 104 (1982); *Woodson* v. *North Carolina*, 428 U. S., at 304 (plurality opinion).

Petitioner's challenge to the Alabama scheme rests instead on the provision of the 1975 Act that allows the judge to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury" in determining whether death is the appropriate sentence. § 13–11–4. This Court has stated that a death sentence based upon consideration of "factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion, or political affiliation of the defendant," would violate the Constitution. *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). Relying upon *Zant*, petitioner contends that, because the jury's mandatory "sentence" would be unconstitutional standing alone, it is an impermissible factor for the trial judge to consider, as the statute appears to require, in the sentencing process. That argument conceivably might have merit if the judge actually were required to consider the jury's "sentence" as a recommendation as to the sentence the jury believed would be appropriate, cf. *Proffitt* v. *Florida*, 428 U. S. 242 (1976), and if the judge were obligated to accord some deference to it. The jury's verdict is not considered in that fashion, however, as the Alabama appellate courts' construction of the Act, as well as the judge's statements regarding the process by which he arrived at the sentence, so definitely indicates.

A

The language of § 13–11–4, to be sure, in so many words does not preclude the sentencing judge from considering the jury's "sentence" in determining whether the death penalty is appropriate. The first clause of the section—"the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment

without parole"—does not authorize or require the court to weigh the jury's "sentence" in determining whether to refuse to impose the death penalty. The second clause—"or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death"—does seem to authorize consideration of the jury's "sentence." It is not clear whether the second clause allows consideration of the jury's "sentence" only if the weighing of the aggravating and mitigating circumstances authorized in the first clause has indicated that the "sentence" should not be rejected, or whether the second clause allows the judge to ignore the first clause and count the jury's "sentence" as a factor, similar to an aggravating circumstance, weighing in favor of the death penalty. We therefore look to the Alabama courts' construction of § 13–11–4. See *Proffitt* v. *Florida*, *supra*; *Jurek* v. *Texas*, 428 U. S. 262, 272–273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.).

The Alabama appellate courts have interpreted the 1975 Act expressly to mean that the sentencing judge is to impose a sentence without regard to the jury's mandatory "sentence." The Alabama Court of Criminal Appeals has stated: "The jury's function is only to find guilt or innocence. The jury is not the sentencing authority." *Jacobs* v. *State*, 361 So. 2d 607, 631 (1977), aff'd, 361 So. 2d 640 (Ala. 1978), cert. denied, 439 U. S. 1122 (1979). Indeed, the court has gone so far as to state:

> "No sentence exists until the pronouncement by the trial judge at the conclusion of the sentence hearing. It is for this reason the court cannot be said to be commuting a sentence of death imposed by the jury, but, in truth and in fact, it is sentencing the accused after a jury's finding of guilt." *Beck* v. *State*, 365 So. 2d 985, 1005, aff'd, 365 So. 2d 1006 (Ala. 1978), rev'd on other grounds, 447 U. S. 625 (1980).

The court further has described the judge's role as follows:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. . . . The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact." *Richardson* v. *State*, 376 So. 2d 205, 224 (1978), aff'd, 376 So. 2d. 228 (Ala. 1979).

Conspicuously absent from the court's description of the judge's duty is any mention of according weight or deference to the jury's "sentence."

The Supreme Court of Alabama agrees that "the jury is not the sentencing authority in . . . Alabama," and has described the sentencing judge not as a reviewer of the jury's "sentence," but as *the* sentencer:

> "In Alabama, the jury is not the body which finally determines which murderers must die and which must not. In fact, Alabama's statute *mandatorily* requires the court to 'hold a hearing to aid the court to determine whether or not the court will *sentence* the defendant to death or to life imprisonment without parole,' and specifically provides that the court may refuse to accept the death penalty as fixed by the jury and may 'sentence' the defendant to death or life without parole. Code of Ala. 1975, § 13–11–4. That section provides that if the *court* imposes a 'sentence of death' it must set forth, in writing, the basis for the sentence." *Jacobs* v. *State*, 361 So. 2d, at 644 (emphasis in original; footnote omitted).

See also *Ritter* v. *State*, 429 So. 2d 928, 935–936 (Ala. 1983); *Beck* v. *State*, 396 So. 2d, at 659.

B

In this case, moreover, it is clear that the sentencing judge did not interpret the statute as requiring him to consider the jury's "sentence," because he never described the "sentence" as a factor in his deliberations. After the jury returned its verdict, the trial judge informed petitioner:

> "Let me say this: The jury has found you guilty of the crime of robbery with the aggravated circumstances of intentionally killing the victim . . . and set your punishment at death by electrocution but the law of this state provides first that there will be an additional hearing in this case at which time *the Court will consider aggravating circumstances, extenuating and all other circumstances, concerning the commission of this particular offense*" (emphasis added). Tr. 249.

In addition, in imposing the sentence, the judge stated:

> "The Court *having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances,* it is the judgment of the Court that the aggravating circumstances far outweigh the mitigating circumstances and that the death penalty as fixed by the jury should be and is hereby accepted" (emphasis added). App. 18.

None of these statements indicates that the judge considered the jury's verdict to be a factor that he added, or that he was required to add, to the scale in determining the appropriateness of the death penalty, or that he believed the jury's verdict was entitled to a presumption of correctness. The judge, of course, knew the Alabama system and all that it signified, knew that the jury's "sentence" was mandatory, and knew that it did not reflect consideration of any mitigating circumstance. The judge logically, therefore, would not

have thought that he owed any deference to the jury's "sentence" on the issue whether the death penalty was appropriate for petitioner.[8]

III

Petitioner contends, nevertheless, that a judge's decision to impose the death penalty *must* be swayed by the fact that the jury returned a "sentence" of death. He points to this Court's opinion in *Beck* v. *Alabama*, 447 U. S. 625, 645 (1980), which expressed some skepticism about the influence the jury's "sentence" would have on a judge. *Beck* held unconstitutional the provision of the 1975 Act that precluded the jury from considering lesser included noncapital offenses. The Court reasoned that the provision violated due process, because where the jury's only choices were to convict a defendant of the capital offense and "sentence" him to death, or to acquit him, but the evidence would have supported a lesser included offense verdict, the factfinding process was tainted with irrelevant considerations. On the one hand, the Court reasoned, the unavailability of the option of convicting on a lesser included offense may encourage the jury to convict the defendant of a capital crime because it believes that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage the jury to acquit because it believes the defendant does not deserve the death penalty. The unavailability of the lesser included offense option, when it is warranted by the evidence, thus "introduce[s] a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case." *Id.*, at 642–643.

In so holding, this Court rejected Alabama's argument that, even if the unavailability of a lesser included offense

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[8] We express no view regarding the constitutionality of a death sentence imposed by a judge who did consider the jury's verdict in this Alabama statutory structure as a factor that weighed in favor of the imposition of the death penalty.

led a jury erroneously to convict a defendant, the fact that the judge was the true sentencer would ensure that the defendant was not improperly sentenced to death. It reasoned:

> "[I]t is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did. Indeed, according to statistics submitted by the State's Attorney General, it is fair to infer that the jury verdict will ordinarily be followed by the judge even though he must hold a separate hearing in aggravation and mitigation before he imposes sentence. Under these circumstances, we are unwilling to presume that a post-trial hearing will always correct whatever mistakes have occurred in the performance of the jury's factfinding function." *Id.*, at 645–646 (footnote omitted).

This Court's concern in *Beck* was that the judge would be inclined to accept the jury's factual finding that the defendant was guilty of a capital offense, not that the judge would be influenced by the jury's "sentence" of death. To "correct" an erroneous guilty verdict, the sentencing judge would have to determine that death was an inappropriate punishment, not because mitigating circumstances outweighed aggravating circumstances, but because the defendant had not been proved guilty beyond a reasonable doubt. Obviously, a judge will think hard about the jury's guilty verdict before basing a sentence on the belief that the defendant was not proved guilty of the capital offense. Indeed, the judge should think hard before rejecting the guilty verdict, because the determination of guilt is properly within the province of the jury, and the jury heard the same evidence regarding guilt as the judge.

It does not follow, however, that the judge will be swayed to impose a sentence of death merely because the jury returned a mandatory death "sentence," when it had no opportunity to consider mitigating circumstances. The judge

knows that determination of the appropriate sentence is not within the jury's province, and that the jury does not consider evidence in mitigation in arriving at its "sentence." The jury's "sentence" means only that the jury found the defendant guilty of a capital crime—that is, that it found the fact of intentional killing in the course of a robbery—and that if the judge finds that the aggravating circumstances outweigh the mitigating circumstances, the judge is authorized to impose a sentence of death. The "sentence" thus conveys nothing more than the verdict of guilty, when it is read in conjunction with the provisions of the 1975 Act making the offense a capital crime, would convey. It defies logic to assume that a judge will be swayed to impose the death penalty by a "sentence" that has so little meaning. Despite its misdescribed label, it is not a sentence of death.

Petitioner also argues that the requirement that the jury return a "sentence" of death "blurs" the issue of guilt with the issue whether death is the appropriate punishment, and may cause the jury arbitrarily to nullify the mandatory death penalty by acquitting a defendant who is proved guilty, but who the jury, without any guidance, finds undeserving of the death penalty. Petitioner's argument stems from *Woodson*, where the plurality opinion noted that American juries "persistently" have refused to convict "a significant portion" of those charged with first-degree murder in order to avoid mandatory death-penalty statutes, and expressed concern that the unguided exercise of the power to nullify a mandatory sentence would lead to the same "wanton" and "arbitrary" imposition of the death penalty that troubled the Court in *Furman*. 428 U. S., at 302–303. The Alabama scheme, however, has not resulted in such arbitrariness. Juries deliberating under the 1975 statute did not act to nullify the mandatory "sentence" by refusing to convict in a significant number of cases; indeed, only 2 of the first 50 defendants tried for capital crimes during the time the 1975 Act was in effect were acquitted. See *Beck* v. *Alabama*, 447 U. S., at 641, n. 18. Thus, while the specter of a mandatory

death sentence may have made juries more prone to acquit, thereby benefiting the two defendants acquitted, it did not render Alabama's scheme unconstitutionally arbitrary.

IV

The wisdom and phraseology of Alabama's curious 1975 statute surely are open to question, as Alabama's abandonment of the statutory scheme in 1981 perhaps indicates.[9] This Court has made clear, however, that "we are unwilling to say that there is any one right way for a State to set up its capital-sentencing scheme." *Spaziano* v. *Florida*, 468 U. S. 447, 464 (1984). See also *Zant* v. *Stephens*, 462 U. S., at 884; *Gregg* v. *Georgia*, 428 U. S., at 195 (opinion of Stewart, POWELL, and STEVENS, JJ.). Alabama's requirement that the jury return a "sentence" of death along with its guilty verdict, while unusual, did not render unconstitutional the death sentence the trial judge imposed after independently considering petitioner's background and character and the circumstances of his crime.

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[9] Following this Court's decisions in *Beck* v. *Alabama*, 447 U. S. 625 (1980), and *Hopper* v. *Evans*, 456 U. S. 605 (1982), the Supreme Court of Alabama held that in a capital case in which the jury is instructed regarding a lesser included noncapital offense

"the requirement in § 13–11–2(a), that the jury 'shall fix the punishment at death' [is construed] to be *permissive and to mean that the jury cannot fix punishment at death until it takes into account the circumstances of the offense together with the character and propensity of the offender, under sentencing procedures which will miminize the risk of an arbitrary and capricious imposition of the death penalty*" (emphasis in original). *Beck* v. *State*, 396 So. 2d, at 660.

The Alabama Legislature then repealed the 1975 Act, and replaced it with a trifurcated proceeding in which the jury first determines guilt or innocence, and, if it returns a guilty verdict, hears evidence concerning aggravation and mitigation. On the basis of that evidence, the jury issues an advisory sentence. If the verdict is for death, that sentence is not binding on the trial judge, who then is required to hold another hearing regarding aggravating and mitigating circumstances before determining the actual sentence. Ala. Code §§ 13A–5–39 to 13A–5–59 (1982).

The judgment of the Supreme Court of Alabama is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

It seems to me that the Court evades the constitutional issue presented, see *ante*, at 386, n. 8, and resolves this case on the basis of a construction of state law (a) that is inconsistent with the relevant state statute, (b) that does not appear in the opinion of the Alabama Supreme Court in this or any other case, and (c) that was not asserted by the State in its arguments before this Court.

The statute at issue states:

> "*Notwithstanding the fixing of punishment at death by the jury*, the court, after weighing the aggravating and mitigating circumstances, may *refuse to accept the death penalty as fixed by the jury* and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, *and the fixing of the punishment at death by the jury*, may accordingly sentence the defendant to death." Ala. Code § 13–11–4 (1975) (emphasis added).

The statutory language, particularly the italicized portions, clearly contemplates that a trial judge sentencing a capital defendant is to consider the jury's "fixing of the punishment at death" along with the aggravating and mitigating circumstances. But according to the Court's opinion, the statute is ambiguous as to whether the judge must consider the jury's "sentence" in all cases or only in cases where he has decided that the death penalty may be appropriate. See *ante*, at 383. Even if the Court is correct on this point, the ambiguity is irrelevant in every case, including this one, in which the trial judge *does in fact* impose the death sentence.

Given the clear import of the statutory language, it is difficult to see any reason to depart from the statute, absent an equally clear contrary statement by a state court. Through-

out its discussion of Alabama case law, however, the Court simply draws inferences from omissions. No Alabama decision holds affirmatively that the trial judge is *not* to consider the jury's "sentence."* The passages quoted by the Court, see *ante*, at 383–385, establish only that the judge, not the jury, is the sentencing authority. This proposition is not inconsistent with the judge's having to consider the jury's "sentence" in the sentencing process.

The opinion of the Alabama Supreme Court does not support the Court's construction of Alabama law. Indeed, the Supreme Court's opinion quotes the statement of the Court of Appeals for the Eleventh Circuit that "'the statute [§ 13–11–4] requires the judge to weigh the mandatory death sentence factor in the balance with his consideration of aggravating and mitigating circumstances in deciding to impose the death penalty.'" *Ex parte Baldwin*, 456 So. 2d 129, 138 (Ala. 1984) (quoting *Ritter* v. *Smith*, 726 F. 2d 1505, 1516 (CA11 1984)); accord, 456 So. 2d, at 141 (Jones, J., concurring in part and dissenting in part). The Alabama court did not refute this construction of the statute; instead, it upheld the statute on the grounds that the jury's "sentence" was not binding on the trial judge and that the statute required the trial judge to consider the circumstances of the particular offense and the character and propensities of the offender. There is no inconsistency between this reasoning and the sentencing judge's having to consider the jury's conclusion along with the other relevant factors.

If state law were as clear as the Court suggests, one would expect the State's otherwise thorough brief to include some support for the Court's view of Alabama law. According to the petitioner, the "very flaw which kills the statute" is that it requires the trial judge to consider the jury's "sentence" "as a factor in the sentencing process." Brief for Petitioner 13. In the face of this contention, it seems that if "[t]he

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*The same is true of the statements of the trial judge in this case. See *ante*, at 385–386.

Alabama appellate courts have interpreted the 1975 Act *expressly* to mean that the sentencing judge is to impose a sentence *without regard* to the jury's mandatory 'sentence,'" *ante*, at 383 (emphasis added), the State would have mentioned that fact in its arguments here. It did not.

The Court should decide whether the 1975 Alabama statute is unconstitutional *because* it requires the trial judge to consider the jury's "sentence" in determining the sentence actually to be imposed. In my view the statute passes constitutional muster.

The 1975 statutory scheme limits capital offenses to murders involving statutorily specified aggravating circumstances. Because each capital offense already includes an aggravating circumstance in the definition of the offense, the jury's mandatory death "sentence" reflects the jury's determination that the State has proved the defined aggravating circumstance beyond a reasonable doubt. Because the trial judge must weigh that circumstance along with the other aggravating circumstances and the mitigating circumstances, *Ex parte Kyzer*, 399 So. 2d 330, 338 (Ala. 1981), it makes complete sense for the judge to take into account the jury's finding on that issue. The statute requires no more in having the trial judge take into account the jury's "sentence" in the process of weighing the aggravating and mitigating circumstances.

JUSTICE BRENNAN, dissenting.

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), and would therefore vacate the petitioner Brian Keith Baldwin's death sentence in any event. But even if I thought otherwise, I would vacate Baldwin's death sentence imposed pursuant to Ala. Code §§ 13–11–2(a) and 13–11–4 (1975) for the reasons set forth in JUSTICE STEVENS' dissent, which I join.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Under a unique statutory provision, since repealed, the jury that convicted Brian Keith Baldwin of aggravated murder was required to "fix [his] punishment at death." Ala. Code § 13–11–2(a) (1975). The trial judge was permitted either to "refuse to accept" the jury's death penalty or to sentence Baldwin to death "after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury." § 13–11–4. In this case, the judge decided that "the death penalty as fixed by the jury should be and hereby is accepted." App. 18.

In my dissenting opinion in *Spaziano* v. *Florida*, 468 U. S. 447, 467 (1984), I explained at some length why the jury, as the spokesman for the community, plays a critical role in the process of deciding whether to impose the death penalty on a defendant convicted of a capital offense.[1] It is my view that no death sentence is constitutionally valid unless it has the sanction of a jury. Even if I did not hold that view, however, I could not accept the Court's conclusion that a "misdescribed" jury sentence of death does not infect a judge's subsequent decision to "accept" that sentence. *Ante*, at 388.

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[1] "Because it is the one punishment that cannot be prescribed by a rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage—its sense that an individual has lost his moral entitlement to live—I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official. This conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decisionmaker that is best able to 'express the conscience of the community on the ultimate question of life or death.' *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968) (footnote omitted)." 468 U. S., at 468–470 (footnotes omitted).

As the Court demonstrates, it would be patently unconstitutional to uphold the death sentence in this case if the jury's mandatory capital verdict were dispositive. *Ante*, at 379–380. In my view, it is also unconstitutional to present an elected trial judge who might otherwise regard the arguments for and against a death sentence as equally balanced with the burden of rejecting a jury verdict of this kind before he can impose a sentence of life.

One reason that we have condemned mandatory jury death sentences in the past is that they are unintelligible. When a jury that convicts a defendant of the crime charged must impose a sentence of death, there is no assurance that its sentence represents the jury's belief that death is the "just and appropriate sentence." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For when the jury has followed proper instructions, conviction should mean nothing more than that the jury believed the defendant guilty beyond a reasonable doubt; unless the jury is willing to violate a sworn oath and nullify the evidence, the death sentence is automatic. See *Beck* v. *Alabama*, 447 U. S. 625, 642, 644 (1980). Of course, even though the verdict is automatic, the jury might believe that the defendant should die.[2] But even if the jury did

[2] "'[M]ost, if not all, jurors at this point in our history perhaps equally abhor setting free a defendant where the evidence establishes his guilt of a serious crime. We have no way of knowing . . . .'" *Beck* v. *Alabama*, 447 U. S., at 642, quoting *Jacobs* v. *State*, 361 So. 2d 640, 652 (Ala. 1978) (Shores, J., dissenting), cert. denied, 439 U. S. 1122 (1979). In this case, Baldwin's jury was told that death was the mandatory sentence upon conviction. 1 Record 20 ("This is a capital crime under the law of this state and the punishment upon conviction is death by electrocution. There are no lesser included offenses"). The jury was not informed that the judge could later refuse its death sentence. See 2 *id.*, at 237–247, 298–303; *Beck*, *supra*, at 639, n. 15. The jury's subsequent verdict stated: "We, the Jury, find the defendant guilty as charged in the indictment, and fix his punishment at death by electrocution." App. 4. Given these facts, I cannot agree with the Court's view that the jury's sentence necessarily "conveys nothing more than the verdict of guilty." *Ante*, at 388. It may or it

intend the consequent death sentence in some sense, it did so with "no guidance whatsoever," *id.*, at 640, and without the "particularized consideration" of relevant factors that the Constitution requires in capital cases. *Woodson*, *supra*, at 303; see *Roberts* v. *Louisiana*, 428 U. S. 325, 333–336 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). Thus a mandatory jury death sentence cannot be said to represent the sort of considered community judgment the Court has approved in the past. See *Jurek* v. *Texas*, 428 U. S. 262, 271–275 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968).[3] Instead, such a mandatory sentence is so "uncertai[n] and unreliab[le]" that it "cannot be tolerated in a capital case." *Beck*, *supra*, at 643.

The arbitrariness and uncertainty of the message conveyed by a mandatory jury death sentence makes such a sentence a constitutionally impermissible factor in a sentencing judge's deliberations. Rather than representing the considered

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may not. The unavoidable uncertainty of the message is one reason such a sentence creates constitutional difficulties.

[3] Justice Jones of the Alabama Supreme Court relied on similar reasoning to make a slightly different nonconstitutional point in his dissent from affirmance of Baldwin's death sentence:

"In my opinion, [the Court's result] overlooks the statutory scheme . . . that gives the jury a vital role in the sentencing process. It may well be that, under the United States Supreme Court's guidelines for administering the death penalty, the [Alabama] statutory scheme would meet federal constitutional muster if the jury's role in the sentencing process had been omitted altogether (assuming, of course, that the statute prescribes an appropriate bifurcated sentencing hearing before the trial judge). But it *was not* omitted . . . .

. . . . . .

"Obviously, the legislature, in retaining the jury's role in the two-step sentencing process, intended for the trial judge, as the final sentencing authority, to have the benefit of the community's input as expressed in the jury's 'recommendation' of sentence. That legislative will—as a due process requisite—is thwarted where the jury is legally bound to 'recommend' only the death penalty." *Ex parte Baldwin*, 456 So. 2d 129, 141–142 (1984) (concurring in part and dissenting in part) (emphasis in original).

judgment of the community based on consideration of all relevant information concerning the particular offense and defendant at bar, such a sentence represents at best the jury's unguided and arbitrary judgment regarding the proper sentence, and at worst merely an unwillingness to set a violent criminal free even though the jury would not have imposed death had it had any discretion. Because the sentencing judge cannot possibly know what meaning, if any, a mandatory jury death sentence conveys, such a sentence is "totally irrelevant to the sentencing process." *Zant* v. *Stephens*, 462 U. S. 862, 885 (1983). In my view, due process of law requires that any death sentence based even in part on such a factor be set aside. *Ibid.*

The record in this case plainly indicates that the jury's sentence was, in fact, on the mind of the judge that sentenced Baldwin in 1977.[4] When the judge scheduled Baldwin's sentencing hearing, he noted that "the jury has . . . set your punishment at death by electrocution, *but . . . first*" he would hold a hearing to consider "all . . . circumstances." 2 Record 249 (emphasis added). His subsequent decision to sentence Baldwin to death was delivered not without reference to the jury's sentence, but rather in terms of "accept[ing]" the death penalty "as fixed by the jury." App. 18. Theoretical speculation regarding what the judge "logically" should have concluded regarding the jury's sentence, *ante*, at 385, is insufficient to overcome the obvious consideration demonstrated by the judge's repeated references to the jury's sentence. We do not know how the sentence weighed in the judge's deliberations, but not even the most careful parsing of words can support a conclusion that he did not "conside[r]" it at all. *Ibid.*

Moreover, it is unrealistic to maintain that such a sentence from the jury does not enter the mind of the sentencing judge. When the Court examined this same sentencing pro-

[4] Cf. *Eddings* v. *Oklahoma*, 455 U. S. 104, 112–114 (1982) (considering record evidence of judge's actual application of Oklahoma capital sentencing law).

vision in 1980, seven Justices agreed that "it is manifest that the jury's verdict must have a tendency to motivate the judge to impose the same sentence that the jury did." *Beck* v. *Alabama*, 447 U. S., at 645. Today, three Justices have changed their view, and the Court now maintains that "[i]t defies logic to assume that a judge will be swayed to impose the death penalty" by a jury sentence of death that was mandatory. *Ante*, at 388. I cannot so easily change my appraisal of human nature. Judges in Alabama, as in many States, are elected. Ala. Const., Amdt. No. 328, §6.13. They are not insulated from community pressure; indeed, responsiveness and accountability to the community provide the justification for an elected judiciary.[5] Although a judge may understand that a mandatory jury sentence of death is, in some sense, meaningless (but see n. 2, *supra*), the community probably does not. A jury sentence of death is likely to be reported and understood as a real sentence of death, as it was in this case.[6]

Whether it "logically" need be so or not, *ante*, at 385, 388, the plain fact is that a judge who later decides to sentence to life in such circumstances is publicly perceived to have rejected the jury's sentence; indeed, the terms of the statute itself embody that perception. The pressures on a judge that inevitably result should not be ignored.[7] In my view,

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[5] See, *e. g.*, P. Dubois, From Ballot to Bench: Judicial Elections and the Quest for Accountability 3, 29, 145 (1980); Sheldon & Lovrich, Judicial Accountability vs. Responsibility: Balancing the Views of Voters and Judges, 65 Judicature 470, 471 (1982).

[6] The day after the jury rendered its verdict, the two major newspapers in Alabama reported the result as "[Baldwin] gets death," The Birmingham News, Aug. 10, 1977, p. 2 and "[Baldwin] Gets Death Penalty," The Montgomery Advertiser, Aug. 10, 1977, p. 15.

[7] We approvingly quoted Justice Jones of the Supreme Court of Alabama to this effect in *Beck*, 447 U. S., at 645, n. 22, after noting that "it is fair to infer that the jury verdict will ordinarily be followed by the judge," *id.*, at 645.

"[T]o leave sentence reduction in the prerogative of the trial court is to place undue pressures upon this office. Again, admittedly, a trial judge

only the Court's distance from the realities of an elected state trial bench can explain its declaration that, as a matter of fact, a jury's mandatory sentence of death will not enter the judge's mind when he considers whether to "refuse" or "accept" the jury's sentence.

Baldwin's argument is not that a capital sentencing judge may never consider the views of a jury as to the appropriate sentence. The Court has approved a capital sentencing system in which a judge ultimately determines the appropriate punishment after receiving an advisory sentence from a fully informed and properly instructed jury. *Proffitt* v. *Florida*, 428 U. S. 242 (1976). But when the jury's sentence is mandatory—as it is here—it does *not* represent the jury's view of an "appropriate" sentence based on full information and the exercise of guided discretion. Rather than providing a sentencing judge with some arguably helpful information about the community's view, such a sentence is either misleading or, at best, irrelevant to the capital sentencing decision.[8]

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must often be the bulwark of the legal system when presented with unpopular causes and adverse public opinion. This State's recent history, however, reflects the outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death. Clearly, this pressure constitutes an undue compulsion on the trial judge to conform the sentence which he imposes with that previously returned by the jury." *Jacobs* v. *State*, 361 So. 2d, at 650–651.

See also *Spaziano* v. *Florida*, 468 U. S., at 475, n. 14 (STEVENS, J., dissenting) ("if the jury recommends death, an elected Florida judge sensitive to community sentiment would have an additional reason to follow that recommendation"); *Ritter* v. *Smith*, 568 F. Supp. 1499, 1521 (SD Ala. 1983) (the identical claim to Baldwin's "appears to be substantial. The automatic death penalty, combined with the inclusion of that penalty in the actual sentencing formula and the sentencing judge's position with respect to the public, might in some circumstances prejudice a defendant where the sentencing decision presented a close case").

[8] Alabama argues that the mandatory jury verdict is really only a procedural mechanism by which the legislature conveys to the sentencing judge its legislative judgment that death presumptively should be the punishment when the definitional facts of capital murder are proved. Aside from the fact that there is no evidence that the legislature actually so intended

The statutory provision at issue has been repealed and is unlikely ever to be replicated. Nevertheless, 10 persons remain to be executed under its command. Because capital punishment is the most extreme and uniquely irreversible expression of societal condemnation, I continue to believe that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (opinion of STEVENS, J.) (emphasis added); accord, *Barefoot* v. *Estelle*, 463 U. S. 880, 938 (1983) (BLACKMUN, J., dissenting). A mandatory jury death sentence serves only to mislead the public and to complicate the task of the sentencing judge with confusing signals and irrelevant pressures. Because I believe the Constitution prohibits such influences in capital cases, I respectfully dissent.

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the mandatory verdict, the implausibility of the legislature choosing such a clumsy means to achieve the suggested end argues against this *pendente lite* interpretation. The Alabama Supreme Court has suggested instead that this mandatory scheme was merely the legislature's response to this Court's somewhat confusing signals in *Furman* v. *Georgia*, 408 U. S. 238 (1972). See *Ritter* v. *State*, 429 So. 2d 928, 934 (Ala. 1983).

In any case, such a purpose would not save this scheme from invalidation, given the arbitrariness inherent in the means. Because every jury in this situation knows that death is the mandatory sentence and has the option of acquittal, the legislature's message will be conveyed only at the whim of any particular jury. Thus, whether or not such a legislative message would be constitutional standing alone, the constitutional procedural flaw of "unguided and unchecked jury discretion" condemned in *Woodson* v. *North Carolina*, 428 U. S. 280, 302 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.), is not removed by the State's theory.

WESTERN AIR LINES, INC. *v.* CRISWELL ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1545. Argued January 14, 1985—Decided June 17, 1985

The Age Discrimination in Employment Act of 1967 (ADEA) generally prohibits mandatory retirement before age 70, but § 4(f)(1) of the Act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business." Petitioner airline company requires that its flight engineers, who are members of the cockpit crews of petitioners' aircraft but do not operate flight controls unless both the pilot and the copilot become incapacitated, retire at age 60. A Federal Aviation Administration regulation prohibits any person from serving as a pilot or copilot after reaching his 60th birthday. Certain of the respondents, who include flight engineers forced to retire at age 60 and pilots who, upon reaching 60, were denied reassignment as flight engineers, brought suit in Federal District Court against petitioner, contending that the age-60 retirement requirement for flight engineers violated the ADEA. Petitioner defended, in part, on the theory that the requirement is a BFOQ "reasonably necessary" to the safe operation of the airline. The physiological and psychological capabilities of persons over age 60, and the ability to detect disease or a precipitous decline in such capabilities on the basis of individual medical examinations, were the subject of conflicting expert testimony presented by the parties. The jury instructions included statements that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of [petitioner's] business"; "the essence of [petitioner's] business is the safe transportation of [its] passengers"; and petitioner could establish a BFOQ by proving both that "it was highly impractical for [petitioner] to deal with each [flight engineer] over age 60 on an individualized basis to determine his particular ability to perform his job safely" and that some flight engineers "over age 60 possess traits of a physiological, psychological or other nature which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age." The District Court entered judgment based on the jury's verdict for the plaintiffs, and the Court of Appeals affirmed, rejecting petitioner's contention that the BFOQ instruction was insufficiently deferential to petitioner's legitimate concern for the safety of its passengers.

Held:

1. The ADEA's restrictive language, its legislative history, and the consistent interpretation of the administrative agencies charged with enforcing the statute establish that the BFOQ exception was meant to be an extremely narrow exception to the general prohibition of age discrimination contained in the ADEA. Pp. 409–412.

2. The relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by safety interests are whether the job qualification is "reasonably necessary" to the overriding interest in public safety, and whether the employer is compelled to rely on age as a proxy for the safety-related job qualification validated in the first inquiry. The latter showing may be made by the employer's establishing either (a) that it had reasonable cause to believe that all or substantially all persons over the age qualification would be unable to perform safely the duties of the job, or (b) that it is highly impractical to deal with the older employees on an individualized basis. Pp. 412–417.

3. The jury here was properly instructed on the elements of the BFOQ defense under the above standard, and the instructions were sufficiently protective of public safety. Pp. 417–423.

(a) Petitioner's contention that the jury should have been instructed to defer to petitioner's selection of job qualifications for flight engineers "that are reasonable in light of the safety risks" is at odds with Congress' decision, in adopting the ADEA, to subject such decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness. The public interest in safety is adequately reflected in instructions that track the statute's language. Pp. 418–420.

(b) The instructions were not defective for failing to inform the jury that an airline must conduct its operations "with the highest possible degree of safety." Viewing the record as a whole, the jury's attention was adequately focused on the importance of safety to the operation of petitioner's business. Pp. 420–421.

(c) There is no merit to petitioner's contention that the jury should have been instructed under the standard that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot be made on an individualized basis. Such standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," and is inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA. Nor can such standard be justified on the ground that an employer must be allowed to resolve the controversy in a conservative

manner when qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis. Such argument incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony. Pp. 421–423.

709 F. 2d 544, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case.

Gordon Dean Booth, Jr., argued the cause for petitioner. With him on the briefs were *William H. Boice*, *Joseph W. Dorn*, and *Wm. John Kennedy*.

Raymond C. Fay argued the cause for respondents. With him on the brief were *Alan M. Serwer* and *Susan D. Goland*.

Deputy Solicitor General Wallace argued the cause for the United States et al. as *amici curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Harriet S. Shapiro*, *Johnny J. Butler*, and *Philip B. Sklover*.*

JUSTICE STEVENS delivered the opinion of the Court.

The petitioner, Western Air Lines, Inc., requires that its flight engineers retire at age 60. Although the Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C.

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*Briefs of *amici curiae* urging reversal were filed for the Air Line Pilots Association, International, by *Michael E. Abram* and *Jay P. Levy-Warren;* for American Airlines, Inc., by *Richard A. Malahowski;* for Delta Air Lines, Inc., by *James W. Callison*, *Robert S. Harkey*, and *Thomas J. Kassin;* for the Equal Employment Advisory Council by *Robert E. Williams*, *Douglas S. McDowell*, and *Thomas R. Bagby;* for Pan American World Airways, Inc., by *Robert S. Venning;* and for Trans World Airlines, Inc., by *Henry J. Oechler, Jr.*, *Donald I. Strauber*, and *Peter N. Hillman*.

Briefs of *amici curiae* urging affirmance were filed for the American Association of Retired Persons by *Alfred Miller* and *Harry P. Cohen;* for the American Civil Liberties Union et al. by *Susan Deller Ross;* and for the Flight Engineers International Association, American Airlines Chapter, AFL–CIO, by *Asher Schwartz* and *David Rosen*.

Howard C. Eglit filed a brief for the National Council on the Aging, Inc., et al. as *amici curiae*.

§§ 621–634, generally prohibits mandatory retirement before age 70, the Act provides an exception "where age is a bona fide occupational qualification [BFOQ] reasonably necessary to the normal operation of the particular business."[1] A jury concluded that Western's mandatory retirement rule did not qualify as a BFOQ even though it purportedly was adopted for safety reasons. The question here is whether the jury was properly instructed on the elements of the BFOQ defense.[2]

I

In its commercial airline operations, Western operates a variety of aircraft, including the Boeing 727 and the McDonnell-Douglas DC–10. These aircraft require three crew members in the cockpit: a captain, a first officer, and a flight engineer. "The 'captain' is the pilot and controls the aircraft. He is responsible for all phases of its operation. The 'first officer' is the copilot and assists the captain. The 'flight engineer' usually monitors a side-facing instrument panel. He does not operate the flight controls unless the captain and the first officer become incapacitated." *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 114 (1985).

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[1] Section 4(f)(1) of the ADEA provides:

"It shall not be unlawful for an employer . . .

"(1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." 81 Stat. 603, 29 U. S. C. § 623(f)(1).

[2] In *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111 (1985), decided earlier this Term, TWA allowed flight engineers to continue working past age 60, and allowed pilots to downbid to flight engineer positions provided that they were able to find an open position prior to their 60th birthdays. See *id.*, at 115–116. Pilots who were displaced for any reason besides the Federal Aviation Administration's age-60 rule, however, were permitted to "bump" less senior persons occupying flight engineer positions without waiting for vacancies to occur. We held that this transfer policy discriminated among pilots on the basis of age, and violated the ADEA. Since TWA did not impose an under-age-60 qualification for flight engineers, however, it had no occasion to rely on the same BFOQ theory presented here by Western.

A regulation of the Federal Aviation Administration (FAA) prohibits any person from serving as a pilot or first officer on a commercial flight "if that person has reached his 60th birthday." 14 CFR § 121.383(c) (1985). The FAA has justified the retention of mandatory retirement for pilots on the theory that "incapacitating medical events" and "adverse psychological, emotional, and physicial changes" occur as a consequence of aging. "The inability to detect or predict with precision an individual's risk of sudden or subtle incapacitation, in the face of known age-related risks, counsels against relaxation of the rule." 49 Fed. Reg. 14695 (1984). See also 24 Fed. Reg. 9776 (1959).

At the same time, the FAA has refused to establish a mandatory retirement age for flight engineers. "While a flight engineer has important duties which contribute to the safe operation of the airplane, he or she may not assume the responsibilities of the pilot in command." 49 Fed. Reg., at 14694. Moreover, available statistics establish that flight engineers have rarely been a contributing cause or factor in commercial aircraft "accidents" or "incidents." *Ibid.*

In 1978, respondents Criswell and Starley were captains operating DC–10s for Western. Both men celebrated their 60th birthdays in July 1978. Under the collective-bargaining agreement in effect between Western and the union, cockpit crew members could obtain open positions by bidding in order of seniority.[3] In order to avoid mandatory retirement

[3] While this lawsuit was proceeding to trial, Criswell and Starley also pursued their remedies under the collective-bargaining agreement. The System Wide Board of Adjustment, over a dissent, ultimately ruled that the contract provision that appeared to authorize the pilots' downbidding was only intended to allow senior pilots operating narrow-body equipment to bid for first officer or flight engineer positions on wide-body aircraft. App. to Pet. for Cert. A84–A90. Since Criswell and Starley were already serving on wide-body aircraft, the provision did not apply to them. The Board also concluded that the provision would not support a transfer "for the obvious purpose of evading the application of [the] agreed retirement plan." *Id.*, at A89. Western relied on this ground in its motion for sum-

under the FAA's under-age-60 rule for pilots, Criswell and Starley applied for reassignment as flight engineers. Western denied both requests, ostensibly on the ground that both employees were members of the company's retirement plan which required all crew members to retire at age 60.[4] For the same reason, respondent Ron, a career flight engineer, was also retired in 1978 after his 60th birthday.

Mandatory retirement provisions similar to those contained in Western's pension plan had previously been upheld under the ADEA. *United Air Lines, Inc.* v. *McMann*, 434 U. S. 192 (1977). As originally enacted in 1967, the Act provided an exception to its general proscription of age discrimination for any actions undertaken "to observe the terms of a . . . bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act."[5] In April 1978, however, Congress amended the statute to prohibit employee benefit plans from requiring the involuntary retirement of any employee because of age.[6]

Criswell, Starley, and Ron brought this action against Western contending that the under-age-60 qualification for

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mary judgment, but the District Court concluded that material questions of fact remained on the question of whether age was a substantial and determinative factor in the denial of the downbids. *Id.*, at A81.

[4] The Western official who was responsible for the decision to retire the plaintiffs conceded that "the sole basis" for the denial of the applications of Criswell, Starley, and Ron was the same: "the provision in the pension plan regarding retirement at age 60." Tr. 1163. In addition, he admitted that he had "no personal knowledge" of any safety rationale for the under-age-60 rule for flight engineers, *id.*, at 2059, nor had it played any significant role in his decision to retire them. See *id.*, at 61, 2027–2033, 2056–2057. The airline sent Starley and Ron form letters informing them of its "considered judgment after examining all of the applicable statutory law that since you have been a member of our Pilot retirement plan, that we cannot continue your employment beyond the normal retirement date of age 60." See App. 89, 91.

[5] § 4(f)(2), 81 Stat. 603, 29 U. S. C. § 623(f)(2).

[6] 92 Stat. 189, 29 U. S. C. § 623(f)(2).

the position of flight engineer violated the ADEA. In the District Court, Western defended, in part, on the theory that the age-60 rule is a BFOQ "reasonably necessary" to the safe operation of the airline.[7] All parties submitted evidence concerning the nature of the flight engineer's tasks, the physiological and psychological traits required to perform them, and the availability of those traits among persons over age 60.

As the District Court summarized, the evidence at trial established that the flight engineer's "normal duties are less critical to the safety of flight than those of a pilot." 514 F. Supp. 384, 390 (CD Cal. 1981). The flight engineer, however, does have critical functions in emergency situations and, of course, might cause considerable disruption in the event of his own medical emergency.

The actual capabilities of persons over age 60, and the ability to detect disease or a precipitous decline in their faculties, were the subject of conflicting medical testimony. Western's expert witness, a former FAA Deputy Federal Air Surgeon,[8] was especially concerned about the possibility of a "cardiovascular event" such as a heart attack. He testified that "with advancing age the likelihood of onset of disease increases and that in persons over age 60 it could not be predicted whether and when such diseases would occur." *Id.*, at 389.

The plaintiffs' experts, on the other hand, testified that physiological deterioration is caused by disease, not aging, and that "it was feasible to determine on the basis of individual medical examinations whether flight deck crew members, including those over age 60, were physically qualified to con-

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[7] Western also contended that its denials of the downbids by pilots Starley and Criswell were based on "reasonable factors other than age." 29 U. S. C. § 623(f)(1); see n. 10, *infra*.

[8] Although the witness had served with the FAA for seven years ending in 1979, he conceded that throughout his tenure at the FAA he never had advocated that the agency extend the age-60 rule to flight engineers. Tr. 1521.

tinue to fly." *Ibid.* These conclusions were corroborated by the nonmedical evidence:

> "The record also reveals that both the FAA and the airlines have been able to deal with the health problems of pilots on an individualized basis. Pilots who have been grounded because of alcoholism or cardiovascular disease have been recertified by the FAA and allowed to resume flying. Pilots who were unable to pass the necessary examination to maintain their FAA first class medical certificates, but who continued to qualify for second class medical certificates were allowed to 'downgrade' from pilot to [flight engineer]. There is nothing in the record to indicate that these flight deck crew members are physically better able to perform their duties than flight engineers over age 60 who have not experienced such events or that they are less likely to become incapacitated." *Id.*, at 390.

Moreover, several large commercial airlines have flight engineers over age 60 "flying the line" without any reduction in their safety record. *Ibid.*

The jury was instructed that the "BFOQ defense is available only if it is reasonably necessary to the normal operation or essence of defendant's business." Tr. 2626. The jury was informed that "the essence of Western's business is the safe transportation of their passengers." *Ibid.* The jury was also instructed:

> "One method by which defendant Western may establish a BFOQ in this case is to prove:
>
> "(1) That in 1978, when these plaintiffs were retired, it was highly impractical for Western to deal with each second officer over age 60 on an individualized basis to determine his particular ability to perform his job safely; and
>
> "(2) That some second officers over age 60 possess traits of a physiological, psychological or other nature

> which preclude safe and efficient job performance that cannot be ascertained by means other than knowing their age.
>
> "In evaluating the practicability to defendant Western of dealing with second officers over age 60 on an individualized basis, with respect to the medical testimony, you should consider the state of the medical art as it existed in July 1978." *Id.*, at 2627.

The jury rendered a verdict for the plaintiffs, and awarded damages. After trial, the District Court granted equitable relief, explaining in a written opinion why it found no merit in Western's BFOQ defense to the mandatory retirement rule. 514 F. Supp., at 389–391.[9]

On appeal, Western made various arguments attacking the verdict and judgment below, but the Court of Appeals affirmed in all respects. 709 F. 2d 544 (CA9 1983). In particular, the Court of Appeals rejected Western's contention that the instruction on the BFOQ defense was insufficiently deferential to the airline's legitimate concern for the safety of its passengers. *Id.*, at 549–551. We granted certiorari to consider the merits of this question. 469 U. S. 815 (1984).[10]

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[9] After the judgment in the *Criswell* action, eight other pilots and one career flight officer filed a separate action seeking similar relief. A preliminary injunction was granted on behalf of the flight engineer, and Western appealed. The Court of Appeals consolidated the appeal with Western's appeal in *Criswell*, and affirmed the preliminary injunction. 709 F. 2d 544, 558–559 (CA9 1983). The plaintiffs in the collateral action are respondents here.

[10] One of Western's claims in the trial court was that its refusal to allow pilots to serve as flight engineers after they reached age 60 was based on "reasonable factors other than age" (RFOA), namely, a facially neutral policy embodied in its collective-bargaining agreement which prohibited downbidding. See nn. 3 and 7, *supra*. The jury rejected this defense in its verdict. On appeal, Western claimed that the instructions had improperly required it to bear the burden of proof on the RFOA issue inasmuch as the burden of persuasion on the issue of age discrimination is at all times on

II

Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. "The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age."[11] As a result, many older American workers perform at levels equal or superior to their younger colleagues.

In 1965, the Secretary of Labor reported to Congress that despite these well-established medical facts there "is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability."[12] Two years later, the President recommended that Congress enact legislation to abolish arbitrary age limits on

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the plaintiff. Cf. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981); *Furnco Construction Co.* v. *Waters*, 438 U. S. 567 (1978). The Court of Appeals rejected this claim on the merits. 709 F. 2d, at 552–553. We granted certiorari to consider the merits of this question, 469 U. S. 815 (1984), but as we read the instructions the burden *was* placed on the plaintiffs on the RFOA issue. The general instruction on the question of discrimination provided that the "burden of proof is on the plaintiffs to show discriminatory treatment on the basis of age." App. 58. The instructions expressly informed the jury when the burden shifted to the defendant to prove various issues, *e. g.*, *id.*, at 60 (business necessity); *id.*, at 61 (BFOQ), but did not so inform the jury in the RFOA instruction, *id.*, at 62–63. Because the plaintiffs were assigned the burden of proof, we need not consider whether it would have been error to assign it to the defendant.

[11] Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 9 (1965) (hereinafter Report), EEOC, Legislative History of the Age Discrimination in Employment Act 26 (1981) (hereinafter Legislative History). See also S. Rep. No. 95–493, p. 2 (1977), Legislative History 435 ("Scientific research . . . indicates that chronological age alone is a poor indicator of ability to perform a job").

[12] Report, at 21, Legislative History 37.

hiring. Such limits, the President declared, have a devastating effect on the dignity of the individual and result in a staggering loss of human resources vital to the national economy.[13]

After further study,[14] Congress responded with the enactment of the ADEA. The preamble declares that the purpose of the ADEA is "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment." 81 Stat. 602, 29 U. S. C. § 621(b). Section 4(a)(1) makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 81 Stat. 603, 29 U. S. C. § 623(a)(1). This proscription presently applies to all persons between the ages of 40 and 70. 29 U. S. C. § 631(a).

The legislative history of the 1978 Amendments to the ADEA makes quite clear that the policies and substantive provisions of the Act apply with especial force in the case of mandatory retirement provisions. The House Committee on Education and Labor reported:

> "Increasingly, it is being recognized that mandatory retirement based solely upon age is arbitrary and that chronological age alone is a poor indicator of ability to perform a job. Mandatory retirement does not take

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[13] "Hundreds of thousands not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination. Despite our present low rate of unemployment, there has been a persistent average of 850,000 people age 45 and over who are unemployed.

. . . . . .

"In economic terms, this is a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families." H. R. Doc. No. 40, 90th Cong., 1st Sess., 7 (1967), Legislative History 61.

[14] See *EEOC* v. *Wyoming*, 460 U. S. 226, 230 (1983).

> into consideration actual differing abilities and capacities. Such forced retirement can cause hardships for older persons through loss of roles and loss of income. Those older persons who wish to be re-employed have a much more difficult time finding a new job than younger persons.
>
> "Society, as a whole, suffers from mandatory retirement as well. As a result of mandatory retirement, skills and experience are lost from the work force resulting in reduced GNP. Such practices also add a burden to Government income maintenance programs such as social security."[15]

In the 1978 Amendments, Congress narrowed an exception to the ADEA which had previously authorized involuntary retirement under limited circumstances. See *supra*, at 405.

In both 1967 and 1978, however, Congress recognized that classifications based on age, like classifications based on religion, sex, or national origin, may sometimes serve as a necessary proxy for neutral employment qualifications essential to the employer's business. The diverse employment situations in various industries, however, forced Congress to adopt a "case-by-case basis . . . as the underlying rule in the administration of the legislation." H. R. Rep. No. 805, 90th Cong., 1st Sess., 7 (1967), Legislative History 80.[16] Congress offered only general guidance on when an age clas-

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[15] H. R. Rep. No. 95–527, pt. 1, p. 2 (1977), Legislative History 362. Cf. S. Rep. No. 95–493, p. 4 (1977), Legislative History 437 ("The committee believes that the arguments for retaining existing mandatory retirement policies are largely based on misconceptions rather than upon a careful analysis of the facts").

[16] "Many different types of employment situations prevail. Administration of this law must place emphasis on case-by-case basis, with unusual working conditions weighed on their own merits. The purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a determining factor in a refusal to hire." S. Rep. No. 723, 90th Cong., 1st Sess., 7 (1967), Legislative History 111.

sification might be permissible by borrowing a concept and statutory language from Title VII of the Civil Rights Act of 1964[17] and providing that such a classification is lawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U. S. C. § 623(f)(1).

Shortly after the passage of the Act, the Secretary of Labor, who was at that time charged with its enforcement, adopted regulations declaring that the BFOQ exception to the ADEA has only "limited scope and application" and "must be construed narrowly." 33 Fed. Reg. 9172 (1968), 29 CFR § 860.102(b) (1984). The Equal Employment Opportunity Commission (EEOC) adopted the same narrow construction of the BFOQ exception after it was assigned authority for enforcing the statute. 46 Fed. Reg. 47727 (1981), 29 CFR § 1625.6 (1984). The restrictive language of the statute and the consistent interpretation of the administrative agencies charged with enforcing the statute convince us that, like its Title VII counterpart, the BFOQ exception "was in fact meant to be an extremely narrow exception to the general prohibition" of age discrimination contained in the ADEA. *Dothard* v. *Rawlinson*, 433 U. S. 321, 334 (1977).

III

In *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d 224 (1976), the Court of Appeals for the Fifth Circuit was called upon to evaluate the merits of a BFOQ defense to a claim of age discrimination. Tamiami Trail Tours, Inc., had a policy of refusing to hire persons over age 40 as intercity bus drivers. At trial, the bus company introduced testimony supporting its theory that the hiring policy was a BFOQ based

[17] Section 703(e) of Title VII permits classifications based on religion, sex or national origin in those certain instances "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U. S. C. § 2000e–2(e)(1).

upon safety considerations—the need to employ persons who have a low risk of accidents. In evaluating this contention, the Court of Appeals drew on its Title VII precedents, and concluded that two inquiries were relevant.

First, the court recognized that some job qualifications may be so peripheral to the central mission of the employer's business that *no* age discrimination can be "reasonably *necessary* to the normal operation of the particular business."[18] 29 U. S. C. § 623(f)(1). The bus company justified the age qualification for hiring its drivers on safety considerations, but the court concluded that this claim was to be evaluated under an objective standard:

> "[T]he job qualifications which the employer invokes to justify his discrimination must be *reasonably necessary* to the essence of his business—here, the *safe* transportation of bus passengers from one point to another. The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to insure safe driving." 531 F. 2d, at 236.

This inquiry "adjusts to the safety factor" by ensuring that the employer's restrictive job qualifications are "reasonably necessary" to further the overriding interest in public safety. *Ibid.* In *Tamiami*, the court noted that no one had seriously

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[18] *Diaz* v. *Pan American World Airways, Inc.*, 442 F. 2d 385 (CA5), cert. denied, 404 U. S. 950 (1971), provided authority for this proposition. In *Diaz* the court had rejected Pan American's claim that a female-only qualification for the position of in-flight cabin attendant was a BFOQ under Title VII. The District Court had upheld the qualification as a BFOQ finding that the airline's passengers preferred the "pleasant environment" and the "cosmetic effect" provided by female attendants, and that most men were unable to perform effectively the "non-mechanical functions" of the job. The Court of Appeals rejected the BFOQ defense concluding that these considerations "are tangential to the essence of the business involved." 442 F. 2d, at 388.

challenged the bus company's safety justification for hiring drivers with a low risk of having accidents.

Second, the court recognized that the ADEA requires that age qualifications be something more than "convenient" or "reasonable"; they must be "reasonably necessary . . . to the particular business," and this is only so when the employer is compelled to rely on age as a proxy for the safety-related job qualifications validated in the first inquiry.[19] This showing could be made in two ways. The employer could establish that it "'had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [persons over the age qualifications] would be unable to perform safely and efficiently the duties of the job involved.'"[20] In *Tamiami*, the employer did not seek to justify its hiring qualification under this standard.

Alternatively, the employer could establish that age was a legitimate proxy for the safety-related job qualifications by proving that it is "'impossible or highly impractical'" to deal with the older employees on an individualized basis.[21] "One method by which the employer can carry this burden is to establish that some members of the discriminated-against class possess a trait precluding safe and efficient job performance

[19] *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d 228 (CA5 1969), provided authority for this proposition. In *Weeks* the court rejected Southern Bell's claim that a male-only qualification for the position of switchman was a BFOQ under Title VII. Southern Bell argued, and the District Court had found, that the job was "strenuous," but the court observed that that "finding is extremely vague." *Id.*, at 234. The court rejected the BFOQ defense concluding that "using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved." *Id.*, at 236. Moreover, the employer had made no showing that it was "impossible or highly impractical to deal with women on an individualized basis." *Id.*, at 235, n. 5.

[20] 531 F. 2d, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d, at 235).

[21] 531 F. 2d, at 235 (quoting *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F. 2d, at 235, n. 5).

that cannot be ascertained by means other than knowledge of the applicant's membership in the class." *Id.*, at 235. In *Tamiami*, the medical evidence on this point was conflicting, but the District Court had found that individual examinations could not determine which individuals over the age of 40 would be unable to operate the buses safely. The Court of Appeals found that this finding of fact was not "clearly erroneous," and affirmed the District Court's judgment for the bus company on the BFOQ defense. *Id.*, at 238.

Congress, in considering the 1978 Amendments, implicitly endorsed the two-part inquiry identified by the Fifth Circuit in the *Tamiami* case. The Senate Committee Report expressed concern that the amendment prohibiting mandatory retirement in accordance with pension plans might imply that mandatory retirement could not be a BFOQ:

> "For example, in certain types of particularly arduous law enforcement activity, there may be a factual basis for believing that substantially all employees above a specified age would be unable to continue to perform safely and efficiently the duties of their particular jobs, and it may be impossible or impractical to determine through medical examinations, periodic reviews of current job performance and other objective tests the employees' capacity or ability to continue to perform the jobs safely and efficiently.
>
> "Accordingly, the committee adopted an amendment to make it clear that where these two conditions are satisfied and where such a bona fide occupational qualification has therefore been established, an employer may lawfully require mandatory retirement at that specified age." S. Rep. No. 95–493, pp. 10–11 (1977), Legislative History 443–444.

The amendment was adopted by the Senate, but deleted by the Conference Committee because it "neither added to nor

worked any change upon present law."[22] H. R. Conf. Rep. No. 95–950, p. 7 (1978), Legislative History 518.

Every Court of Appeals that has confronted a BFOQ defense based on safety considerations has analyzed the problem consistently with the *Tamiami* standard.[23] An EEOC regulation embraces the same criteria.[24] Considering the narrow language of the BFOQ exception, the parallel treatment of such questions under Title VII, and the uniform application of the standard by the federal courts, the EEOC, and Congress, we conclude that this two-part inquiry prop-

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[22] Senator Javits, an active proponent of the legislation, obviously viewed the BFOQ defense as a narrow one when he explained that it could be proved when "the employer can demonstrate that there is an objective, factual basis for believing that virtually all employees above a certain age are unable to safely perform the duties of their jobs and where, in addition, there is no practical medical or performance test to determine capacity." 123 Cong. Rec. 34319 (1977), Legislative History 506. See also H. R. Rep. No. 95–527, pt. 1, p. 12, Legislative History 372.

[23] See, *e. g.*, *Monroe* v. *United Air Lines, Inc.*, 736 F. 2d 394 (CA7 1984), cert. denied, 470 U. S. 1004 (1985); *Johnson* v. *American Airlines, Inc.*, 745 F. 2d 988, 993–994 (CA5 1984), cert. pending, No. 84–1271; 709 F. 2d, at 550 (case below); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d 743, 752–753 (CA7), cert. denied, 464 U. S. 992 (1983); *Tuohy* v. *Ford Motor Co.*, 675 F. 2d 842, 844–845 (CA6 1982); *Smallwood* v. *United Air Lines, Inc.*, 661 F. 2d 303, 307 (CA4 1981), cert. denied, 456 U. S. 1007 (1982); *Arritt* v. *Grisell*, 567 F. 2d 1267, 1271 (CA4 1977). Cf. *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d 670, 676–677 (CA9 1980) (Title VII).

[24] 46 Fed. Reg. 47727 (1981), 29 CFR § 1625.6(b) (1984):

"An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact."

erly identifies the relevant considerations for resolving a BFOQ defense to an age-based qualification purportedly justified by considerations of safety.

IV

In the trial court, Western preserved an objection to any instruction in the *Tamiami* mold, claiming that "any instruction pertaining to the statutory phrase 'reasonably necessary to the normal operation of [defendant's] business' . . . is irrelevant to and confusing for the deliberations of the jury."[25] Western proposed an instruction that would have allowed it to succeed on the BFOQ defense by proving that "in 1978, when these plaintiffs were retired, there existed a *rational basis in fact* for defendant to believe that use of [flight engineers] over age 60 on its DC–10 airliners would increase the likelihood of risk to its passengers."[26] The proposed instruction went on to note that the jury might rely on the FAA's age-60 rule for pilots to establish a BFOQ under this standard "without considering any other evidence."[27] It also noted that the medical evidence submitted by the parties might provide a "rational basis in fact."

On appeal, Western defended its proposed instruction, and the Court of Appeals soundly rejected it. 709 F. 2d, at 549–551. In this Court, Western slightly changes its course.

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[25] Record, Doc. No. 164 (objections to plaintiffs proposed BFOQ instruction).

[26] *Ibid.* (Defendant's Proposed Instruction No. 19) (emphasis added). In support of the "rational basis in fact" language in the proposed instruction Western cited language in the Seventh Circuit's opinion in *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859 (1974), cert. denied, 419 U. S. 1122 (1975), which had been criticized by the Fifth Circuit panel in *Tamiami* and which the Seventh Circuit later repudiated. *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 752–753. Western also relied on the District Court's opinion in *Tuohy* v. *Ford Motor Co.*, 490 F. Supp. 258 (ED Mich. 1980), which was reversed on appeal, 675 F. 2d 842 (CA6 1982).

[27] Record, Doc. No. 164 (Defendant's Proposed Instruction No. 19.1).

The airline now acknowledges that the *Tamiami* standard identifies the relevant general inquiries that must be made in evaluating the BFOQ defense. However, Western claims that in several respects the instructions given below were insufficiently protective of public safety. Western urges that we interpret or modify the *Tamiami* standard to weigh these concerns in the balance.

Reasonably Necessary Job Qualifications

Western relied on two different kinds of job qualifications to justify its mandatory retirement policy. First, it argued that flight engineers should have a low risk of incapacitation or psychological and physiological deterioration. At this vague level of analysis respondents have not seriously disputed—nor could they—that the qualification of good health for a vital crew member is reasonably necessary to the essence of the airline's operations. Instead, they have argued that age is not a necessary proxy for that qualification.

On a more specific level, Western argues that flight engineers must meet the same stringent qualifications as pilots, and that it was therefore quite logical to extend to flight engineers the FAA's age-60 retirement rule for pilots. Although the FAA's rule for pilots, adopted for safety reasons, is relevant evidence in the airline's BFOQ defense, it is not to be accorded conclusive weight. *Johnson* v. *Mayor and City Council of Baltimore*, *ante*, at 370–371. The extent to which the rule is probative varies with the weight of the evidence supporting its safety rationale and "the congruity between the . . . occupations at issue." *Ante*, at 371. In this case, the evidence clearly established that the FAA, Western, and other airlines all recognized that the qualifications for a flight engineer were less rigorous than those required for a pilot.[28]

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[28] As the Court of Appeals noted, the "jury heard testimony that Western itself allows a captain under the age of sixty who cannot, for health reasons, continue to fly as a captain or co-pilot to downbid to a position as

In the absence of persuasive evidence supporting its position, Western nevertheless argues that the jury should have been instructed to defer to "Western's selection of job qualifications for the position of [flight engineer] that are reasonable in light of the safety risks." Brief for Petitioner 30. This proposal is plainly at odds with Congress' decision, in adopting the ADEA, to subject such management decisions to a test of objective justification in a court of law. The BFOQ standard adopted in the statute is one of "reasonable necessity," not reasonableness.

In adopting that standard, Congress did not ignore the public interest in safety. That interest is adequately reflected in instructions that track the language of the statute. When an employer establishes that a job qualification has been carefully formulated to respond to documented concerns for public safety, it will not be overly burdensome to persuade a trier of fact that the qualification is "reasonably necessary" to safe operation of the business. The uncertainty implicit in the concept of managing safety risks always makes it "reasonably necessary" to err on the side of caution in a close case.[29] The employer cannot be expected to establish the risk of an airline accident "to a certainty, for certainty would require running the risk until a tragic accident would

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second officer. [In addition,] half the pilots flying in the United States are flying for major airlines which do not require second officers to retire at the age of sixty, and . . . there are over 200 such second officers currently flying on wide-bodied aircraft." 709 F. 2d, at 552. See also *supra*, at 406–407.

[29] Several Courts of Appeals have recognized that safety considerations are relevant in making or reviewing findings of fact. See, *e. g.*, *Levin* v. *Delta Air Lines, Inc.*, 730 F. 2d 994, 998 (CA5 1984); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 755; *Tuohy* v. *Ford Motor Co.*, 675 F. 2d, at 845; *Murnane* v. *American Airlines, Inc.*, 215 U. S. App. D. C. 55, 58, 667 F. 2d 98, 101 (1981), cert. denied, 456 U. S. 915 (1982); *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d, at 863. Such considerations, of course, are only relevant at the margin of a close case, and do not relieve the employer from its burden of establishing the BFOQ by the preponderance of credible evidence.

prove that the judgment was sound." *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d, at 238. When the employer's argument has a credible basis in the record, it is difficult to believe that a jury of laypersons—many of whom no doubt have flown or could expect to fly on commercial air carriers—would not defer in a close case to the airline's judgment. Since the instructions in this case would not have prevented the airline from raising this contention to the jury in closing argument, we are satisfied that the verdict is a consequence of a defect in Western's proof rather than a defect in the trial court's instructions.[30]

Western's Statutory Safety Obligation

The instructions defined the essence of Western's business as "the safe transportation of their passengers." Tr. 2626. Western complains that this instruction was defective because it failed to inform the jury that an airline must conduct its operations "with the highest possible degree of safety."[31]

Jury instructions, of course, "may not be judged in artificial isolation," but must be judged in the "context of the overall charge" and the circumstances of the case. See *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). In this case, the instructions characterized safe transportation as the "essence"

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[30] Moreover, we do not find that petitioner's proposed instructions made any reference to the notion of deference to the expertise of the employer, except insofar as that concept was implicit in the "rational basis in fact" standard reflected in its proposed instructions. As we reject that standard as inconsistent with the statute, *infra*, at 421–423, we are somewhat reluctant to fault the trial judge for not giving an instruction that was not requested.

[31] This standard is set forth in the Federal Aviation Act, which provides, in part:

"In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Secretary of Transportation shall give full consideration to the duty resting upon air carriers to perform their services with *the highest possible degree of safety* in the public interest . . . ." 49 U. S. C. App. § 1421(b) (emphasis added).

of Western's business and specifically referred to the importance of "safe and efficient job performance" by flight engineers. Tr. 2627. Moreover, in closing argument counsel pointed out that because "safety is the essence of Western's business," the airline strives for "the highest degree possible of safety."[32] Viewing the record as a whole, we are satisfied that the jury's attention was adequately focused on the importance of safety to the operation of Western's business. Cf. *United States* v. *Park*, 421 U. S. 658, 674 (1975).

Age as a Proxy for Job Qualifications

Western contended below that the ADEA only requires that the employer establish "a rational basis in fact" for believing that identification of those persons lacking suitable qualifications cannot occur on an individualized basis.[33] This "rational basis in fact" standard would have been tantamount to an instruction to return a verdict in the defendant's favor. Because that standard conveys a meaning that is significantly different from that conveyed by the statutory phrase "reasonably necessary," it was correctly rejected by the trial court.[34]

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[32] "We have tried to present, throughout the case, our view that safety is the essence of Western's business. It is the core, it is what the air passenger service business is all about. We have a duty to our passengers, which we consider to be the most important duty of all the business operations that we engage in, including making money. Our first duty is that the passengers and the crews on all our aircraft are safe. And we attempt to render to them the highest degree possible of safety." Tr. 2514.

[33] In this Court Western proposes a "factual basis" standard. We do not perceive any substantial difference between this standard and the instruction that it sought below, and we discuss the question as it was raised in the proposed instructions, and discussed in the Court of Appeals.

[34] This standard has been rejected by nearly every court to consider it. 709 F. 2d, at 550–551 (case below); *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F. 2d, at 755–756; *Tuohy* v. *Ford Motor Co.*, 675 F. 2d, at 845; *Harriss* v. *Pan American World Airways, Inc.*, 649 F. 2d, at 677; *Arritt* v. *Grisell*, 567 F. 2d, at 1271; *Usery* v. *Tamiami Trail Tours, Inc.*, 531 F. 2d, at 235–236.

Western argues that a "rational basis" standard should be adopted because medical disputes can never be proved "to a certainty" and because juries should not be permitted "to resolve bona fide conflicts among medical experts respecting the adequacy of individualized testing." Reply Brief for Petitioner 9, n. 10. The jury, however, need not be convinced beyond all doubt that medical testing is impossible, but only that the proposition is true "on a preponderance of the evidence." Moreover, Western's attack on the wisdom of assigning the resolution of complex questions to 12 laypersons is inconsistent with the structure of the ADEA. Congress expressly decided that problems involving age discrimination in employment should be resolved on a "case-by-case basis" by proof to a jury.[35]

The "rational basis" standard is also inconsistent with the preference for individual evaluation expressed in the language and legislative history of the ADEA.[36] Under the Act, employers are to evaluate employees between the ages of 40 and 70 on their merits and not their age. In the BFOQ defense, Congress provided a limited exception to this general principle, but required that employers validate any discrimination as "reasonably necessary to the normal operation of the particular business." It might well be "rational" to require mandatory retirement at *any* age less than 70, but that result would not comply with Congress' direction that employers must justify the rationale for the age chosen. Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age lack the qualifications required for the position, the age selected for mandatory retirement less than 70 must be an age at which it

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[35] *Supra*, at 411, and n. 16; 29 U. S. C. § 626(c)(2); *Lorillard* v. *Pons*, 434 U. S. 575 (1978).

[36] Indeed, under a "rational basis" standard a jury might well consider that its "inquiry is at an end" with an expert witness' articulation of any "plausible reaso[n]" for the employer's decision. Cf. *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 179 (1980).

is highly impractical for the employer to insure by individual testing that its employees will have the necessary qualifications for the job.

Western argues that its lenient standard is necessary because "where qualified experts disagree as to whether persons over a certain age can be dealt with on an individual basis, an employer must be allowed to resolve that controversy in a conservative manner." Reply Brief for Petitioner 8–9. This argument incorrectly assumes that all expert opinion is entitled to equal weight, and virtually ignores the function of the trier of fact in evaluating conflicting testimony. In this case, the jury may well have attached little weight to the testimony of Western's expert witness. See *supra*, at 406, and n. 8. A rule that would require the jury to defer to the judgment of any expert witness testifying for the employer, no matter how unpersuasive, would allow some employers to give free reign to the stereotype of older workers that Congress decried in the legislative history of the ADEA.

When an employee covered by the Act is able to point to reputable businesses in the same industry that choose to eschew reliance on mandatory retirement earlier than age 70, when the employer itself relies on individualized testing in similar circumstances, and when the administrative agency with primary responsibility for maintaining airline safety has determined that individualized testing is not impractical for the relevant position, the employer's attempt to justify its decision on the basis of the contrary opinion of experts—solicited for the purposes of litigation—is hardly convincing on any objective standard short of complete deference. Even in cases involving public safety, the ADEA plainly does not permit the trier of fact to give complete deference to the employer's decision.

The judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL took no part in the decision of this case.

RICHARDSON-MERRELL INC. *v.* KOLLER, AN INFANT, BY AND THROUGH KOLLER ET UX., HER NATURAL GUARDIANS, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84–127. Argued February 26, 1985—Decided June 17, 1985

Respondent Anne Koller was born without normal arms or legs. She filed suit in Federal District Court, alleging that during pregnancy her mother had taken an antinausea drug manufactured by petitioner and that this drug had caused respondent's birth defects. Respondent was initially represented by Miami and Washington law firms, but a Los Angeles law firm later took the lead in trial preparation. Before trial, the District Court disqualified the Los Angeles firm and revoked the appearances of two of its attorneys because of misconduct. Respondent appealed the disqualification to the Court of Appeals, which stayed all proceedings in the District Court pending the outcome of the appeal. The Court of Appeals thereafter held that 28 U. S. C. § 1291—which grants courts of appeals jurisdiction of appeals from all "final decisions of the district courts," except where a direct appeal lies to this Court—confers jurisdiction over interlocutory appeals of orders disqualifing counsel in a civil case. The Court of Appeals then held that the disqualification in question was invalid.

Held: Orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal as "final judgments" within the meaning of § 1291, and hence the Court of Appeals lacked jurisdiction to entertain respondent's appeal. Pp. 429–441.

(a) To fall within the "collateral order" exception to the "final judgment" rule, an order must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. Pp. 429–432.

(b) One purpose of the "final judgment" rule embodied in § 1291 is to avoid delay that inherently accompanies time-consuming interlocutory appeals. When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided. A disqualified attorney's personal desire for vindication does not constitute an independent justification for a interlocutory appeal, but, as a matter of professional ethics, the decision to appeal should turn entirely on the client's interest. Nor does the

use of disqualification motions to harass opposing counsel constitute an independent justification for an immediate appeal of the disqualification order, since implicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police litigants' prejudgment tactics. The possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement. Pp. 433–436.

(c) Civil disqualification orders do not meet the requirements of the "collateral order" exception. If prejudice is *not* a prerequisite to reversal of a judgment following disqualification of counsel, the propriety of the disqualification order can be reviewed as effectively on appeal of a final judgment as on a interlocutory appeal. If prejudice *is* a prerequisite to reversal, disqualification orders are not sufficiently separate from the merits to qualify for interlocutory appeal. *Flanagan* v. *United States*, 465 U. S. 259. Even apart from *Flanagan*'s analysis, civil disqualification orders are often inextricable from the merits of the litigation. Pp. 436–440.

237 U. S. App. D. C. 333, 737 F. 2d 1038, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 441. STEVENS, J., filed a dissenting opinion, *post*, p. 442. POWELL, J., took no part in the decision of the case.

Lawrence E. Walsh argued the cause for petitioner. With him on the briefs were *Guy Miller Struve*, *Ogden N. Lewis*, *Whitney L. Schmidt*, *Vincent H. Cohen*, *Robert B. Cave*, and *Richard C. Ford*.

Michael H. Gottesman argued the cause for respondents. With him on the brief were *Robert M. Weinberg*, *Jacob A. Stein*, and *Robert F. Muse*.*

JUSTICE O'CONNOR delivered the opinion of the Court.

Last Term, in *Flanagan* v. *United States*, 465 U. S. 259 (1984), the Court unanimously held that pretrial orders disqualifying counsel in criminal cases are not subject to im-

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**Jonathan D. Blake*, *Charles S. Sims*, *Burt Neuborne*, and *Arthur B. Spitzer* filed a brief for the Washington Post et al. as *amici curiae* urging affirmance.

mediate appeal under 28 U. S. C. § 1291. In this case, the Court of Appeals for the District of Columbia Circuit held that § 1291 confers jurisdiction over interlocutory appeals of orders disqualifying counsel in a civil case. 237 U. S. App. D. C. 333, 737 F. 2d 1038 (1984). Because we conclude that orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal, we reverse.

I

Respondent Anne Koller (hereafter respondent) was born without normal arms or legs in a District of Columbia hospital in 1979. She filed suit in the United States District Court for the District of Columbia, alleging that petitioner Richardson-Merrell, Inc., is liable for her birth defects. The complaint alleged that respondent's mother, Cynthia Koller, had taken the antinausea drug Bendectin during the early stages of her pregnancy, and that the drug had caused Anne Koller's injuries. Petitioner is the manufacturer of Bendectin.

Respondent was initially represented by Cohen & Kokus, a Miami law firm, and by local counsel in Washington. As discovery progressed into 1981, however, a Los Angeles law firm, Butler, Jefferson, Dan & Allis, took the lead in trial preparation. James G. Butler entered an appearance *pro hac vice* for respondent on January 26, 1981; his partner Nicholas Allis was admitted *pro hac vice* on October 19, 1982. As the case neared trial in early 1983, respondent's counsel of record included at least eight lawyers from the Cohen firm, the Butler firm, and two Washington firms.

On December 22, 1982, Nicholas Allis' secretary, Krystyna Janowski, twice called the offices of Davis, Polk & Wardwell, Richardson-Merrell's attorneys. Janowski left messages indicating that Koller's suit was fraudulent and that Cynthia Koller had not taken Bendectin during the crucial early weeks of her pregnancy. App. 19–20. Janowski subsequently regretted her actions, and on December 26 she told

a paralegal at her firm that investigators for Richardson-Merrell had been attempting to persuade her to sign a statement indicating that Koller's case was fraudulent.

The next day, Allis twice went to see Janowski, first at a hospital where the secretary was visiting her child, and later at the secretary's apartment. During the second visit, Allis was accompanied by a private investigator who surreptitiously taped the conversation on a concealed tape recorder. Allis presented Janowski a typed statement indicating that "[a]t no time did I ever hear Cynthia Koller or anyone else say that Cynthia Koller did not take Bendectin." *Id.*, at 26–27. Janowski signed the statement. The following day, December 28, 1982, Allis received a copy of a letter that Davis, Polk & Wardwell had sent to the District Court. The letter recounted Janowski's telephone calls, informed the court that petitioner had engaged independent counsel for Janowski, and requested a hearing. *Id.*, at 21–22. Allis' firm responded with its own letter to the court. The letter recounted the story Janowski had told Allis. A copy of the statement obtained from Janowski was attached. *Id.*, at 23–25. During subsequent discovery into the matter, Janowski recanted the signed statement.

While the District Court and counsel were struggling with these unusual revelations, they were also preparing for an imminent trial. A pretrial hearing was scheduled to commence on January 31, 1983, and trial was to commence immediately upon the conclusion of the hearing. On January 17, 1983, the trial judge issued a pretrial ruling excluding collateral evidence related to two children who had birth defects like those of the respondent. The court ruled that it would not "grant plaintiffs a license to submit the birth defects of children whose only demonstrable relationship to Anne Koller is that they have suffered birth defects that are superficially similar." *Id.*, at 60–61. On January 28, 1983, James Butler submitted to the Food and Drug Administration a set of "Drug Experience Reports" prepared by his firm. The

reports described the birth defects of a number of children whose mothers had taken Bendectin, including the two children covered by the District Court's order of January 17. In an accompanying letter, Butler urged the FDA to take Bendectin off the market. Butler sent copies of the reports and his letter to a reporter for the Washington Post.

On January 31, 1983, the District Court ruled that it would not admit any "Drug Experience Reports" that were submitted to the FDA more than one year after the birth of the children involved. *Id.*, at 84–91. The 14 reports Butler had submitted to the FDA fell within this category. The following day, a Washington Post reporter interviewed Butler at the attorney's invitation. *Id.*, at 341. Butler discussed the *Koller* case and the materials he had sent to the FDA. On February 7, 1983, after the court had already called the February jury pool from which the *Koller* jury panel would likely be drawn, the Washington Post published a lengthy article discussing the *Koller* case and the Drug Experience Reports which the trial court had excluded from evidence.

In the wake of these events, the District Court postponed the trial and allowed further discovery concerning Janowski's allegations. In February 1983, petitioner moved to disqualify Butler, Allis, and their firm from the *Koller* case on the ground of their alleged misconduct. After a 4-day evidentiary hearing on the issue of whether respondent's law firm had improperly obtained Janowski's statement, the District Judge issued an order requiring Butler and Allis to show cause why they and their firm should not be disqualified. The show cause order identified two "alleged incidents of misconduct" as possible grounds for disqualification: Butler's release of information to the Washington Post in an effort to "prejudice the jury" and to "bring inadmissible evidence before the jury pool," and Allis' preparing and obtaining a statement from Janowski "without regard for the truth" of the statement in an effort to protect his firm's financial interest and to thwart an investigation. *Id.*, at 246–248.

Butler and Allis opposed disqualification and defended their conduct in testimony at a lengthy hearing. Nevertheless, on January 6, 1984, the District Judge found that Allis had attempted "to thwart a true investigation of a crucial witness" and that Butler's release of information to the media "was calculated to prejudice the defendant's case and circumvent the Court's prior rulings." App. to Pet. for Cert. 77a–78a. Noting that respondent's other counsel of record could provide competent representation, the court revoked the *pro hac vice* admissions of Butler and Allis and the appearance of their law firm. *Id.*, at 80a.

Respondent appealed the disqualification to the Court of Appeals for the District of Columbia Circuit, which stayed all proceedings in the trial court pending the outcome of the appeal.[1] App. 339. The Court of Appeals subsequently held that it had jurisdiction to entertain the appeal pursuant to 28 U. S. C. § 1291. On the merits, the panel held that the District Court's disqualification order was invalid and that the appearances of Allis, Butler, and their firm should be reinstated. 237 U. S. App. D. C. 333, 737 F. 2d 1038 (1984). We granted certiorari to review the Court of Appeals' jurisdictional ruling as well as its decision on the merits of the disqualification. 469 U. S. 915 (1984).

II

Title 28 U. S. C. § 1291 grants the courts of appeals jurisdiction of appeals from all "final decisions of the district courts," except where a direct appeal lies to this Court. The statutory requirement of a "final decision" means that "a party must ordinarily raise all claims of error in a single

[1] In their response to the District Court's order to show cause, Butler and Allis suggested that the court should certify any ruling disqualifying them for appeal pursuant to 28 U. S. C. § 1292(b). App. 253. Respondent apparently never moved for certification after the disqualification order of January 4, 1984. The sole basis for appellate jurisdiction asserted by respondent and by the Court of Appeals is 28 U. S. C. § 1291.

appeal following final judgment on the merits." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 374 (1981). As the Court noted in *Firestone*, the final judgment rule promotes efficient judicial adminstration while at the same time emphasizing the deference appellate courts owe to the district judge's decisions on the many questions of law and fact that arise before judgment. *Ibid.*; *Flanagan* v. *United States*, 465 U. S., at 263–264. Immediate review of every trial court ruling, while permitting more prompt correction of erroneous decisions, would impose unreasonable disruption, delay, and expense. It would also undermine the ability of district judges to supervise litigation. In § 1291 Congress has expressed a preference that some erroneous trial court rulings go uncorrected until the appeal of a final judgment, rather than having litigation punctuated by "piecemeal appellate review of trial court decisions which do not terminate the litigation." *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 265 (1982).

An order disqualifying counsel in a civil case is not a final judgment on the merits of the litigation. There has been no trial or final judgment in this case, and indeed the stay imposed by the Court of Appeals assures that there can be none pending the outcome of these interlocutory proceedings. Section 1291 accordingly provides jurisdiction for this appeal only if orders disqualifying counsel in civil cases fall within the "collateral order" exception to the final judgment rule. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), the Court recognized an exception to the final judgment rule for a "small class" of prejudgment orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, [and are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The collateral order doctrine is a "narrow exception," *Firestone*, *supra*, at 374, whose reach is limited to trial court

orders affecting rights that will be irretrievably lost in the absence of an immediate appeal. See *Helstoski* v. *Meanor*, 442 U. S. 500, 506–508 (1979); *Abney* v. *United States*, 431 U. S. 651, 660–662 (1977). To fall within the exception, an order must at a minimum satisfy three conditions: It must "conclusively determine the disputed question," "resolve an important issue completely separate from the merits of the action," and "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978). Our recent decisions have strictly applied this test when parties pursued immediate appeal of trial court rulings on motions to disqualify counsel.

In *Firestone*, *supra*, the Court held that a trial court order denying a motion to disqualify counsel in a civil case was not subject to immediate appeal. The Court assumed without deciding that such a ruling resolves an important issue completely separate from the merits, and thus meets the second part of the *Coopers & Lybrand* test. 449 U. S., at 376. Nevertheless, the Court refused to permit an interlocutory appeal because it found an order denying disqualification to be reviewable on appeal after a final judgment. JUSTICE MARSHALL's opinion for the Court observed:

> "An order refusing to disqualify counsel plainly falls within the large class of orders that are indeed reviewable on appeal after final judgment, and not within the much smaller class of those that are not. The propriety of the district court's denial of a disqualification motion will often be difficult to assess until its impact on the underlying litigation may be evaluated, which is normally only after final judgment. *The decision whether to disqualify an attorney ordinarily turns on the particular factual situation of the case then at hand, and the order embodying such a decision will rarely, if ever, represent a final rejection of a claim of fundamental right that cannot effectively be reviewed following judgment on the merits.*" *Id.*, at 377 (emphasis added).

Firestone expressly left open the issue of whether orders *granting* disqualification are subject to immediate appeal, as well as the issue of whether orders denying disqualification in a criminal case fall within the collateral order exception. *Id.*, at 372, n. 8.

Flanagan v. *United States*, *supra*, decided one of the issues left open in *Firestone*. There the Court held that a district court's pretrial order granting disqualification of defense counsel in a criminal case was not immediately appealable under § 1291. The unanimous opinion in *Flanagan* emphasized the strong interest of both the parties and society as a whole in speedy resolution of criminal cases. This important interest counsels application of the final judgment rule with "utmost strictness." 465 U. S., at 265. The Court then applied the standards enunciated in *Coopers & Lybrand* and concluded that criminal disqualification orders do not qualify for immediate appeal.

Since *Flanagan* was decided, the Courts of Appeals have divided on the appealability of orders disqualifying counsel in a civil case. Compare *Gibbs* v. *Paluk*, 742 F. 2d 181, 184 (CA5 1984) (rejecting appeal pursuant to § 1291 in reliance on *Flanagan*), and *Kahle* v. *Oppenheimer & Co.*, 748 F. 2d 337 (CA6 1984) (rejecting appeal of order disqualifying counsel who was needed as witness), with *Banque de Rive, S.A.* v. *Highland Beach Development Corp.*, 758 F. 2d 559 (CA11 1985) (distinguishing *Flanagan* and accepting appeal pursuant to § 1291); *Interco Systems, Inc.* v. *Omni Corporate Services, Inc.*, 733 F. 2d 253, 255 (CA2 1984) (same); and *Panduit Corp.* v. *All States Plastics Manufacturing Co.*, 744 F. 2d 1564 (CA Fed. 1984) (same). We granted certiorari to resolve the conflict.

III

The decision below allowing immediate appeal of the disqualification order rests primarily on two lines of reasoning. First, the Court of Appeals identifies policy considerations that suggest civil disqualification orders should fall within the

collateral order doctrine even though criminal disqualification orders do not. Second, the court attempts to distinguish *Flanagan*'s application of the *Coopers & Lybrand* test.

A

At least four policy considerations are articulated in the course of the appellate opinion. First, the panel suggests that the societal interest in prompt adjudication of disputes is weaker in civil cases than in criminal cases, and that the "extraordinary limits on the collateral order doctrine" in the criminal context have not been carried over to civil cases. 237 U. S. App. D. C., at 345–346, 737 F. 2d, at 1050–1051. The appellate court further reasons that "disruption and delay of proceedings on the merits are unhappily foreseeable byproducts of the injudicious use of disqualification motions," and that this disruption "would be exacerbated were orders disqualifying counsel not immediately appealable." *Id.*, at 359, 737 F. 2d, at 1064. Third, the panel concludes that immediate appeal should be available not only to vindicate the client's choice of counsel, but also to vindicate "the interest of the attorneys, who are parties to this appeal, in correcting what they claim is an erroneous finding of misconduct." *Id.*, at 348–349, 737 F. 2d, at 1053–1054. The panel notes that "[i]n the event that plaintiffs were satisfied with the final verdict obtained by substitute counsel, the disqualified attorneys could be left with no means whatsoever of vindicating their own important interests on appeal from a final judgment." *Ibid.* Finally, the Court of Appeals expresses concern that the use of motions to disqualify counsel in order to delay civil proceedings and to harass opponents has become prevalent in recent years. "To insulate from prompt review an erroneous order granting a motion to disqualify counsel," the Court of Appeals concluded, "would only raise the stakes in this dangerous game." *Id.*, at 346, 737 F. 2d, at 1051.

We do not find these policy arguments persuasive. Although delay is anathema in criminal cases, it is also unde-

sirable in civil disputes, as the Court of Appeals itself recognized. One purpose of the final judgment rule embodied in § 1291 is to avoid the delay that inherently accompanies time-consuming interlocutory appeals. *Flanagan*, 465 U. S., at 264. When an appellate court accepts jurisdiction of an order disqualifying counsel, the practical effect is to delay proceedings on the merits until the appeal is decided. As in this case, the appellate court may stay all proceedings during appellate review. Even where the appellate court fails to impose a stay, it would take an intrepid District Judge to proceed to trial with alternate counsel while her decision disqualifying an attorney is being examined in the Court of Appeals.

The delay accompanying an appeal results not only when counsel appeals "injudicious use of disqualification motions," but also when counsel appeals an entirely proper disqualification order. Most pretrial orders of district judges are ultimately affirmed by appellate courts. 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3907, p. 433 (1976). Given an attorney's personal and financial interest in the disqualification decision, orders disqualifying counsel may be more likely to lead to an interlocutory appeal than other pretrial rulings, whether those rulings are correct or otherwise. To be sure, an order granting disqualification itself leads to delay. Alternate counsel must often be retained. Even in cases like this one where competent alternate counsel had already entered appearances and participated in the litigation, such counsel will need time to gain the knowledge of the disqualified attorneys. But where the disqualification decision of the trial court is correct, this delay is unavoidable. We do not think that the delay resulting from the occasionally erroneous disqualification outweighs the delay that would result from allowing piecemeal appeal of every order disqualifying counsel.

We also decline to view the disqualified attorney's personal desire for vindication as an independent ground for interlocu-

tory appeal. An attorney who is disqualified for misconduct may well have a personal interest in pursuing an immediate appeal, an interest which need not coincide with the interests of the client. As a matter of professional ethics, however, the decision to appeal should turn entirely on the client's interest. See ABA Model Rules of Professional Conduct 1.7(b), 2.1 (1985). In neither *Firestone* nor *Flanagan* did the Court regard the attorney's personal interest in a disqualification ruling as relevant or dispositive. Moreover, a rule precluding appeal pursuant to § 1291 would not necessarily leave the client or the disqualified attorney without a remedy. As we noted in *Firestone*, "a party may seek to have the question certified for interlocutory appellate review pursuant to 28 U. S. C. § 1292(b), . . . and, in the exceptional circumstances for which it was designed, a writ of mandamus from the court of appeals might be available." 449 U. S., at 378–379, n. 13. Alternatively, if the client obtains an unsatisfactory judgment with substitute counsel, the disqualification ruling may be challenged on appeal of a final judgment. Even when the client is satisfied with the judgment obtained by substitute counsel, an attorney whose reputation has been egregiously injured by the trial court's disqualification decision might be able to obtain relief from the Circuit Judicial Council pursuant to 28 U. S. C. § 332(d)(1).[2]

[2] Although it is well established that Judicial Councils do not exist to review claims that a particular trial judge's rulings were erroneous, *In re Charge of Judicial Misconduct*, 613 F. 2d 768 (CA9 1980), they do exist "to provide an administrative remedy for misconduct of a judge for which no judicial remedy is available." *In re Charge of Judicial Misconduct*, 595 F. 2d 517 (CA9 1979). Cf. *In re Complaint of A. H. Robins Co.*, JCP 84–001 (CA8 Judicial Council, Dec. 26, 1984) (noting that Judicial Council conducted hearings, received briefs, and heard oral arguments on complaint that Federal District Judge improperly accused counsel of misconduct, and then dismissed complaint as moot only because a Circuit panel found separate grounds to permit an appeal in *Gardiner* v. *A. H. Robins Co.*, 747 F. 2d 1180 (CA8 1984)).

Finally, we share the Court of Appeals' concern about "tactical use of disqualification motions" to harass opposing counsel. Nevertheless, we do not believe that this "dangerous game" constitutes an independent justification for immediate appeal of an order disqualifying an attorney. Implicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings. Cf. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S., at 546 ("Appeal gives the upper court a power of review, not one of intervention"). Like any referee, the district judge will occasionally make mistakes. A mistaken ruling disqualifying counsel imposes financial hardship on both the disqualified lawyer and the client. But the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress. *Coopers & Lybrand*, 437 U. S., at 476, and n. 28; *Will* v. *United States*, 389 U. S. 90, 98, n. 6 (1967). "If the expense of litigation were a sufficient reason for granting an exception to the final judgment rule, the exception might well swallow the rule." *Lusardi* v. *Xerox Corp.*, 747 F. 2d 174, 178 (CA3 1984). The *Coopers & Lybrand* test looks not to the litigation expense imposed by a possibly erroneous ruling, but rather to whether the right affected by the ruling can and should be protected by appeal prior to judgment. To that inquiry we now turn.

B

In *Flanagan*, the Court held that orders disqualifying counsel in criminal cases cannot satisfy either the second or the third parts of the *Coopers & Lybrand* test: If a showing of prejudice is a prerequisite to reversal, then the ruling is not "completely separate" from the merits because it cannot be assessed until a final judgment has been entered; on the

other hand, if a showing of prejudice is not required, then the ruling can be effectively reviewed on appeal of the final judgment. 465 U. S., at 267–269. Apart from its policy discussion, the Court of Appeals held that *Flanagan*'s analysis is inapplicable in the civil context.

First, the appellate panel asserted that a showing of prejudice would be required in civil cases: "Only an erroneous disqualification combined with prejudice at trial could conceivably result in outright reversal of a civil judgment." 237 U. S. App. D. C., at 347, 737 F. 2d, at 1052. Nevertheless, the panel concluded that the ruling is both incapable of review on appeal of a final judgment and completely separate from the merits. The panel concluded that a disqualification order is unreviewable on appeal of a final judgment because:

> "[I]t would appear virtually impossible to show prejudice resulting from the absence of one counsel and the substitution of another. In a criminal case, a reviewing court could at least draw from the extensive body of law concerning effective assistance of counsel as a first step in determining whether substitute counsel's performance prejudiced the defense so as to require reversal. In the civil context, however, the court would be without a starting point; because there is no sixth amendment right involved, there is no body of law to help a court evaluate whether a civil judgment should be overturned because of the quality of counsel's representation." *Ibid.* (footnote omitted).

The panel finally concluded that the disqualification ruling was completely separate from the merits, even though prejudice is a prerequisite to reversal of a judgment, because (1) it would be difficult to show that prejudice resulted from an erroneous disqualification; (2) the extensive record in this particular case "presents an entirely adequate basis for determining whether the district court's order was proper"; and (3) the "validity" of a disqualification order in a civil case

does not depend on either prejudice or the Sixth Amendment right to counsel. *Id.*, at 347–348, 737 F. 2d, at 1052–1053.

We find these efforts to distinguish *Flanagan* unavailing. To a large extent, the Court of Appeals' analysis rests on a conundrum of its own making. This Court has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases. As in *Flanagan*, we need not today decide this question. But we note that the difficulties in proving prejudice identified by the Court of Appeals go more to the issue of the showing required to reverse a final judgment than to whether a disqualification order should be subject to immediate appeal.

The Court of Appeals relies on a requirement of prejudice to overcome the third *Coopers & Lybrand* requirement that the ruling "be effectively unreviewable on appeal from a final judgment." 437 U. S., at 468. Yet by reversing the decision of the District Court on the interlocutory appeal, the Court of Appeals implicitly held that a showing of prejudice is not required on interlocutory appeal. We are unpersuaded by this analysis. As in *Flanagan*, we conclude that, if establishing a violation of one's right to counsel of choice in civil cases requires no showing of prejudice, then "a pretrial order violating the right does not meet the third condition for coverage by the collateral-order exception: it is not 'effectively unreviewable on appeal from a final judgment.'" 465 U. S., at 268. Absent a requirement of prejudice, the propriety of the trial court's disqualification order can be reviewed as effectively on appeal of a final judgment as on an interlocutory appeal.

We must likewise reject the Court of Appeals' suggestion that civil orders disqualifying counsel satisfy the second condition of the collateral order exception. To do so it is enough to rely on *Flanagan*. If the nature of the right to representation by counsel of one's choice is that "[it] is not violated absent some specifically demonstrated prejudice," *ibid.*, then

a disqualification order, though "final," is not independent of the issues to be tried. Only after assessing the effect of the ruling on the final judgment could an appellate court decide whether the client's rights had been prejudiced. If respondent were to proceed to trial and there receive as effective or better assistance from substitute counsel than the disqualified attorney could provide, any subsequent appeal of the disqualification ruling would fail. For the same reasons as in *Flanagan*, the disqualification ruling would be inextricably tied up in the merits.

Even apart from *Flanagan*'s analysis, we would conclude that orders disqualifying counsel in civil cases are not "completely separate from the merits of the action." *Coopers & Lybrand*, 437 U. S., at 468. The Court of Appeals asserts that, in this particular case, the extensive record "presents an entirely adequate basis for determining whether the district court's order was proper." 237 U. S. App. D. C., at 348, 737 F. 2d, at 1053. This Court, however, has expressly rejected efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be subject to appeal. *Coopers & Lybrand, supra*, at 473–475. Even if some orders disqualifying counsel are separable from the merits of the litigation, many are not. Orders disqualifying attorneys on the ground that they should testify at trial, for example, are inextricable from the merits because they involve an assessment of the likely course of the trial and the effect of the attorney's testimony on the judgment. *Kahle* v. *Oppenheimer & Co.*, 748 F. 2d, at 339. Appellate review of orders disqualifying counsel for misconduct may be entwined with the merits of the litigation as well. If reversal hinges on whether the alleged misconduct is "likely to infect future proceedings," 237 U. S. App. D. C., at 351, 737 F. 2d, at 1056, courts of appeals will often have to review the nature and content of those proceedings to determine whether the standard is met. In this case, for example, the Court of Appeals opinion exhaustively discusses

respondent's claim on the merits, the relevance of the alleged instances of misconduct to the attorney's zealous pursuit of that claim, the pretrial proceedings in the trial court, and the danger that it will be difficult for the trial judge "to act with complete impartiality in future proceedings." *Id.*, at 359, 737 F. 2d, at 1064. In light of these factors, we conclude that orders disqualifying counsel in civil cases, as a class, are not sufficiently separable from the merits to qualify for interlocutory appeal.

IV

We acknowledge that an order disqualifying counsel may impose significant hardship on litigants. Particularly where the grounds for disqualification are troubling, this hardship may tempt courts of appeals to assert jurisdiction pursuant to § 1291. But in the words of Judge Adams:

> "[I]t would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress." *Bachowski* v. *Usery*, 545 F. 2d 363, 373–374 (CA3 1976).

As in *Firestone*, we decline to "transform the limited exception carved out in *Cohen* into a license for broad disregard of the finality rule imposed by Congress in § 1291." 449 U. S., at 378.

We hold that orders disqualifying counsel in civil cases, like orders disqualifying counsel in criminal cases and orders denying a motion to disqualify in civil cases, are not collateral orders subject to appeal as "final judgments" within the meaning of 28 U. S. C. § 1291. The Court of Appeals lacked

jurisdiction to entertain respondent's appeal and should not have reached the merits. *Firestone*, 449 U. S., at 379. We accordingly do not address the additional issues on which we granted certiorari, and we do not intimate any view on the merits of the District Court's disqualification decision.

The judgment of the Court of Appeals is vacated, and the case is remanded with instructions to dismiss the appeal for want of jurisdiction.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, concurring.

A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings. To be sure, that right is qualified. A court need not, for example, permit an individual to retain anyone at all, regardless of qualifications, to represent him in open court. Nor must a court continue to permit an individual to be represented by an attorney who by his misconduct in open court has threatened the integrity of the proceedings. Nonetheless, if an attorney is adequately qualified and has not otherwise acted so as to justify disqualification, the client need not obtain the permission of the court or of his adversary to retain the attorney of his choice.

I share the view of the Court and the Court of Appeals below that the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation. When a trial court mistakenly disqualifies a party's counsel as the result of an abusive disqualification motion, the court in essence permits the party's opponent to dictate his choice of counsel. As the court below recognized, this result is in serious tension with the premises of our adversary system, see 237 U. S. App. D. C. 333, 352, 737 F. 2d 1038, 1057 (1984), and some remedy must therefore be avail-

able to correct the error. The question before the Court today is whether that remedy is an automatic interlocutory appeal or whether instead the remedy is simply a stringent review of the disqualification decision on review of the final judgment in the case.

The Court holds that the plaintiff in this case must undergo the burdens of trial without the counsel of her choice before being permitted to obtain appellate review of what may well be an erroneous disqualification. As the Court points out, this result is in accord with our recent decisions in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368 (1981), and *Flanagan* v. *United States*, 465 U. S. 259 (1984). Today's case, however, is somewhat different from both of those cases. Respondent's attempt to vindicate her right to the attorney of her choice is substantially more compelling than the claim in *Firestone* of a "right" not to have one's opponent represented by counsel who has misbehaved. And permitting an interlocutory appeal here would not implicate the strong public interest in speedy disposition of criminal trials that influenced the decision in *Flanagan*. Nonetheless, a litigant's right to retain an attorney of choice can be protected on review of final judgment if appellate courts are willing when necessary to set aside verdicts—even when they result from lengthy civil proceedings. Moreover, today's result could well give pause to a party considering an abusive disqualification motion, for an improper grant of such a motion could jeopardize an ultimate jury verdict in his favor. On the understanding that the courts of appeals will develop standards for reviewing final judgments that will effectively protect each litigant's right to retain the attorney of choice, I join the Court's opinion.

JUSTICE STEVENS, dissenting.

Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right. The difficult question presented by this case is whether the denial

of that right by a district court's disqualification order can effectively be reviewed following a judgment on the merits.[1]

In my opinion, *Flanagan* v. *United States*, 465 U. S. 259 (1984), does not control the decision in this case. The strong public interest in the prompt disposition of criminal charges—an interest shared by both the prosecutor and the defendant—is not present to the same extent in the civil context where the defendant's interest in delay may motivate a motion to disqualify in a borderline case.[2] Moreover, in a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal; review after trial on the merits is therefore "effective" to protect the right.

In the civil context, I do not believe a pretrial disqualification order would similarly be effectively reviewable after the entry of a final judgment. Prejudice to a litigant's right to go to trial with the advocate of his choice is suffered the moment a disqualification order is granted. Nevertheless, after a trial with substitute counsel has been held, I would be most reluctant to subscribe to a rule requiring reversal without a showing of some impact on the outcome. Yet I believe it would be virtually impossible to demonstrate that an outcome has been affected by the change of counsel as opposed to the other myriad variables present in civil litigation. Both prejudice to the litigant's freedom of choice and the substantive basis of attorney disqualifications based on pretrial actions are "completely separate"[3] from the underlying merits. I am therefore persuaded that a disqualifica-

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[1] See *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (matters "effectively reviewable" after final judgment not subject to interlocutory appeal).

[2] See 237 U. S. App. D. C. 333, 346, 737 F. 2d 1038, 1051 (1984) (while "tactical use of motions to disqualify counsel" recently have become prevalent in civil cases, "[w]e are aware of no comparable phenomenon in criminal cases").

[3] *Coopers & Lybrand*, *supra*, at 468.

tion order fits squarely within the classic formulation of an appealable collateral order:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949).

This was the unanimous conclusion of the Courts of Appeals that addressed attorney disqualification orders prior to *Flanagan*, and remained the conclusion of four of the five Courts of Appeals that addressed the issue of attorney disqualifications for pretrial misconduct following that decision. I am more confident of the ability of the various Courts of Appeals to evaluate the problem of disqualification motions and supervise the local bench and bar than I am of the accuracy of our own more distant perspective.

On the merits of the disqualification of respondent Koller's counsel here, I agree with the Court of Appeals' explanation of why the District Court's decision was erroneous as a matter of law. See 237 U. S. App. D. C. 333, 349–359, 737 F. 2d 1038, 1054–1064 (1984). Accordingly, I would affirm the judgment of the Court of Appeals.

SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT WALPOLE *v.* HILL ET AL.

CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 84–438. Argued March 25, 1985—Decided June 17, 1985

Respondent inmates in a Massachusetts state prison each received disciplinary reports charging them with assaulting another inmate. At separate hearings, a prison disciplinary board heard testimony from a prison guard and received his written report. According to this evidence the guard heard some commotion in a prison walkway and, upon investigating, discovered an inmate who evidently had just been assaulted, and saw three other inmates, including respondents, fleeing down the walkway. The board found respondents guilty and revoked their good time credits. After an unsuccessful appeal to the prison superintendent, respondents filed a complaint in Massachusetts Superior Court alleging that the board's decisions violated their constitutional rights because there was no evidence to support the board's findings. The Superior Court granted summary judgment for respondents, holding that the board's findings of guilt rested on no evidence constitutionally adequate to support the findings, and ordered that the lost good time be restored. The Massachusetts Supreme Judicial Court affirmed.

Held:

1. Since the Massachusetts Supreme Judicial Court interpreted a state statute as providing for judicial review of respondents' claims, there is no need to decide whether due process would require judicial review. Pp. 449–453.

2. Assuming that good time credits constitute a protected liberty interest, the revocation of such credits must be supported by some evidence in order to satisfy the minimum requirements of procedural due process. Such a requirement will help to prevent arbitrary deprivation without threatening institutional interests or imposing undue administrative burdens. Ascertaining whether the "some evidence" standard is satisfied does not require examination of the entire record, independent assessment of witnesses' credibility, or weighing of the evidence, but, instead, the relevant question is whether there is any evidence in the record to support the disciplinary board's conclusion. Pp. 453–456.

3. In this case, the evidence before the disciplinary board was sufficient to meet the requirements imposed by the Due Process Clause of

the Fourteenth Amendment. Although the evidence might be characterized as meager, and there was no direct evidence identifying any one of the three fleeing inmates as the assailant, the record is not so devoid of evidence that the board's findings were without support or otherwise arbitrary. Pp. 456–457.

392 Mass. 198, 466 N. E. 2d 818, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, and III of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 457.

Barbara A. H. Smith, Assistant Attorney General of Massachusetts, argued the cause for petitioner. With her on the briefs were *Francis X. Bellotti*, Attorney General, and *Martin E. Levin*, Assistant Attorney General.

Jamie Ann Sabino, by appointment of the Court, 469 U. S. 1084, argued the cause for respondents. With her on the brief was *Richard B. Klibaner*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Wallace*, and *Kathleen A. Felton;* and for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Steve White*, Chief Assistant Attorney General, *Arnold Overoye*, Assistant Attorney General, *William George Prahl* and *Susan J. Orton*, Deputy Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *Anthony B. Ching*, Solicitor General, *Joseph L. Lieberman*, Attorney General of Connecticut, *Cornelius Tuohy*, Assistant Attorney General, *Michael A. Lilly*, Attorney General of Hawaii, *Neil Hartigan*, Attorney General of Illinois, *Jill Wine-Banks*, Solicitor General, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *David Armstrong*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *Frank J. Kelley*, Attorney General of Michigan, *Lewis J. Caruso*, Solicitor General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Edwin Lloyd Pittman*, Attorney General of Mississippi, *Robert L. Gibbs*, Assistant Attorney General, *John Ashcroft*, Attorney General of Missouri, *John M. Morris*, *Mike Greely*, Attorney General of Montana, *Paul Douglas*, Attorney General of Nebraska, *Rufus L. Edmisten*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney

JUSTICE O'CONNOR delivered the opinion of the Court.

Massachusetts inmates who comply with prison rules can accumulate good time credits that reduce the term of imprisonment. Mass. Gen. Laws Ann., ch. 127, § 129 (West 1974). Such credits may be lost "if a prisoner violates any rule of his place of confinement." *Ibid.* The question presented is whether revocation of an inmate's good time credits violates the Due Process Clause of the Fourteenth Amendment if the decision of the prison disciplinary board is not supported by evidence in the record. We conclude that where good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence. Because the record in this case contains sufficient evidence to support the decision of the disciplinary board, we reverse.

I

Respondents Gerald Hill and Joseph Crawford are inmates at a state prison in Walpole, Mass. In May 1982, they each received prison disciplinary reports charging them with assaulting another inmate. At separate hearings for each inmate, a prison disciplinary board heard testimony from a prison guard, Sergeant Maguire, and received his written disciplinary report. According to the testimony and report, Maguire heard an inmate twice say loudly, "What's going on?" The voice came from a walkway that Maguire could partially observe through a window. Maguire immediately opened the door to the walkway and found an inmate named Stephens bleeding from the mouth and suffering from a swollen eye. Dirt was strewn about the walkway, and Maguire viewed this to be further evidence of a scuffle. He saw three inmates, including respondents, jogging away together down the walkway. There were no other inmates

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General of Ohio, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *John Easton, Jr.*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, and *A. G. McClintock*, Attorney General of Wyoming.

in the area, which was enclosed by a chain link fence. Maguire concluded that one or more of the three inmates had assaulted Stephens and that they had acted as a group. Maguire also testified at Hill's hearing that a prison "medic" had told him that Stephens had been beaten. Hill and Crawford each declared their innocence before the disciplinary board, and Stephens gave written statements that the other inmates had not caused his injuries.

After hearing the evidence in each case, the disciplinary board found respondents guilty of violating prison regulations based on their involvement in the assault. App. 19, 27. The board recommended that Hill and Romano each lose 100 days of good time and be confined in isolation for 15 days. Respondents unsuccessfully appealed the board's action to the superintendent of the prison. *Id.*, at 23, 30. They then filed a complaint in the Superior Court, State of Massachusetts, alleging that the decisions of the board violated their constitutional rights because "there was no evidence to confirm that the incident took place nor was there any evidence to state that if the incident did take place the [respondents] were involved." *Id.*, at 10. After reviewing the record, the Superior Court concluded that "the Board's finding of guilty rested, in each case, on no evidence constitutionally adequate to support that finding." App. to Pet. for Cert. 8b. The Superior Court granted summary judgment for respondents and ordered that the findings of the disciplinary board be voided and the lost good time restored.

The Massachusetts Supreme Judicial Court affirmed. 392 Mass. 198, 466 N. E. 2d 818 (1984). Inmates who observe prison rules, the state court noted, have a statutory right to good time credits and the loss of such credits affects a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. *Id.*, at 201, 466 N. E. 2d, at 821. The Supreme Judicial Court then observed that an entitlement to "judicial review of the sufficiency of the evidence to warrant

the board's findings" logically follows from *Wolff* v. *McDonnell*, 418 U. S. 539 (1974). 392 Mass., at 201, 466 N. E. 2d, at 821. Without deciding whether the appropriate standard of review is "some evidence" or the stricter test of "substantial evidence," *id.*, at 203, n. 5, 466 N. E. 2d, at 822, n. 5, the Supreme Judicial Court agreed with the trial judge that the record failed to present even "some evidence which, if believed, would rationally permit the board's findings." *Id.*, at 203, 466 N. E. 2d, at 822 (footnote omitted).

The Massachusetts Attorney General filed a petition for a writ of certiorari urging this Court to decide whether prison inmates have a due process right to judicial review of prison disciplinary proceedings or, alternatively, whether the standard of review applied by the state court was more stringent than is required by the Due Process Clause. Pet. for Cert. i, 20–21. We granted the petition, 469 U. S. 1016 (1984), and we now reverse.

II

Petitioner first argues that the state court erred by holding that there is a constitutional right to judicial review of the sufficiency of evidence where good time credits are revoked in a prison disciplinary proceeding. *Ortwein* v. *Schwab*, 410 U. S. 656 (1973) *(per curiam)*, petitioner contends, found no denial of due process where a filing fee prevented claimants from obtaining judicial review of an administrative decision reducing welfare payments. Petitioner urges that a similar conclusion should apply here: respondents were afforded all the process due when they received a hearing before the disciplinary board. Cf. *id.*, at 659–660 (pretermination evidentiary hearing met requirements of due process despite lack of judicial review). Respondents answer by noting decisions of this Court which suggest that due process might require some form of judicial review of administrative decisions that threaten constitutionally protected liberty or property interests. See, *e. g.*, *St. Joseph Stockyards Co.* v. *United States*,

298 U. S. 38, 51–52 (1936); *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–285 (1922).

The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law. See, *e. g.*, *Califano* v. *Sanders*, 430 U. S. 99, 109 (1977); 5 K. Davis, Administrative Law Treatise § 28:3 (2d ed. 1984); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1375–1378, 1388–1391 (1953). The *per curiam* opinion in *Ortwein* did not purport to resolve this question definitively; nor are we disposed to construe that case as implicitly holding that due process would never require some form of judicial review of determinations made in prison disciplinary proceedings. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 87 (1932) (Brandeis, J., dissenting) ("under certain circumstances, the constitutional requirement of due process is a requirement of judicial process"). Whether the Constitution requires judicial review is only at issue if such review is otherwise barred, and we will not address the constitutional question unless it is necessary to the resolution of the case before the Court. See *Johnson* v. *Robison*, 415 U. S. 361, 366–367 (1974).

Assuming, *arguendo*, that a decision revoking good time credits would violate due process if it were not supported by some modicum of evidence, we need not decide today whether the Constitution also requires judicial review of a challenge to a decision on such grounds. The Supreme Judicial Court correctly observed, 392 Mass., at 201, 466 N. E. 2d, at 821, that this Court has not previously held that the Due Process Clause creates a right to judicial review of prison disciplinary proceedings. Although the opinion of the state court does speak in terms of a constitutional entitlement, careful examination of that opinion persuades us that judicial review was available to respondents pursuant to

Mass. Gen. Laws Ann., ch. 249, § 4 (West Supp. 1984), which provides in pertinent part:

> "A civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court."

Petitioner notes that there is no statutory provision for judicial review of decisions by a prison disciplinary board. Nonetheless, the Supreme Judicial Court has observed that "'[i]n the absence of a statutory method of judicial review, certiorari is an appropriate mode for correcting errors of law arising out of an administrative action.'" *Taunton Eastern Little League* v. *Taunton*, 389 Mass. 719, 720, n. 1, 452 N. E. 2d 211, 212, n. 1 (1983), quoting *Reading* v. *Attorney General*, 362 Mass. 266, 269, 285 N. E. 2d 429, 431 (1972). In the present case, the Supreme Judicial Court expressly stated that respondents, who framed their complaints as petitions for a "'writ of habeas corpus ad testificandum,'" should have brought civil actions pursuant to § 4. 392 Mass., at 199, n. 2, 466 N. E. 2d, at 819, n. 2. The state court supported this conclusion by citing its previous decision in *Boston Edison Co.* v. *Board of Selectmen of Concord*, 355 Mass. 79, 242 N. E. 2d 868 (1968), and the decision of the Appeals Court of Massachusetts in *Cepulonis* v. *Commissioner of Correction*, 15 Mass. App. 292, 445 N. E. 2d 178 (1983).

Boston Edison relied on § 4 to review a challenge to the sufficiency of the evidence to support decisions by town selectmen denying rights-of-way for power lines. At the time *Boston Edison* was decided, § 4 allowed a party to petition the Supreme Judicial Court for a writ of certiorari on a claim "that the evidence which formed the basis of the action complained of or the basis of any specified finding or conclusion was as a matter of law insufficient to warrant such action,

finding or conclusion." Mass. Gen. Laws Ann., ch. 249, § 4 (West 1959). Petitioner correctly informed this Court that the quoted phrase and the writ of certiorari were abolished by 1973 amendments to § 4, 1973 Mass. Acts, ch. 1114, § 289. Tr. of Oral Arg. 25, 50–51. Somewhat inexplicably, petitioner failed to add that the 1973 amendments substituted "'a civil action in the nature of certiorari'" for the previously available writ, and did not narrow the relief formerly obtainable under the statute. See, *e. g.*, *Boston Edison Co.* v. *Boston Redevelopment Authority*, 374 Mass. 37, 47–49, 371 N. E. 2d 728, 737–738 (1977).

The second decision cited by the Supreme Judicial Court, *Cepulonis*, construed an inmate's challenge to a finding of a prison disciplinary board "as seeking review in the nature of certiorari" under § 4. 15 Mass. App., at 292, 445 N. E. 2d, at 178. *Cepulonis* did not address a due process claim; instead, the inmate contended that the disciplinary board's finding was not supported by "reliable evidence" as required by regulations of the Massachusetts Department of Corrections. *Id.*, at 293, 445 N. E. 2d, at 179. Thus, *Boston Edison* and *Cepulonis* relied on § 4 to provide an avenue for judicial review where an adjudicatory decision by a nonjudicial body was challenged as not supported by sufficient evidence. In those cases, the aggrieved parties argued that the evidence was insufficient to meet standards imposed by state law. See also *1001 Plays, Inc.* v. *Mayor of Boston*, 387 Mass. 879, 444 N. E. 2d 931 (1983) (§ 4 challenge to sufficiency of evidence to support denial of license for video game arcade); *McSweeney* v. *Town Manager of Lexington*, 379 Mass. 794, 401 N. E. 2d 113 (1980) (noting that appropriate standard varies according to nature of action sought to be reviewed).

Nothing in the opinion of the Supreme Judicial Court in this case suggests that § 4 would be unavailable where a party alleges that evidence is insufficient under a standard imposed by the Federal Constitution. Cf. 392 Mass., at 202–203, 466 N. E. 2d, at 821–822 (failure to provide for

review under state Administrative Procedure Act does not indicate legislative intent to preclude judicial review of sufficiency of evidence for disciplinary board decisions). Indeed, previous decisions by the Supreme Judicial Court indicate that § 4 provides a means of review in state court where an administrative decision is challenged on federal constitutional grounds. See, *e. g.*, *Taunton Eastern Little League* v. *Taunton*, *supra*, at 720–722, 452 N. E. 2d, at 212–213 (Establishment Clause challenge to rescission of beano license). We therefore interpret the opinion of the state court as holding that § 4 provides a mechanism for judicial review of respondents' claims. Given the rule of judicial restraint requiring us to avoid unnecessary resolution of constitutional issues, see, *e. g.*, *Ashwander* v. *TWA*, 297 U. S. 288, 346–347 (1936) (Brandeis, J., concurring), we decline to decide in this case whether due process would require judicial review.

III

The issue we address is whether findings of a prison disciplinary board that result in the loss of good time credits must be supported by a certain amount of evidence in order to satisfy due process. Petitioner argues that the Supreme Judicial Court applied too strict a standard in reviewing the decision of the disciplinary board and that such decisions should be upheld unless they are arbitrary and capricious. Brief for Petitioner 5, 19–21; Pet. for Cert. i, 20–21. In *Wolff* v. *McDonnell*, 418 U. S. 539 (1974), the Court held that due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits. Petitioner does not challenge the holding below that Massachusetts law creates a liberty interest in good time credits. See also *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 456 N. E. 2d 1100 (1983) (statutory good time credits constitute a liberty interest protected by due process). Accordingly, we proceed on the assumption that the protections of the Fourteenth Amendment apply to the loss of the good time credits involved here, and direct

our inquiry to the nature of the constitutionally required procedures.

Where a prison disciplinary hearing may result in the loss of good time credits, *Wolff* held that the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. 418 U. S., at 563–567. Although *Wolff* did not require either judicial review or a specified quantum of evidence to support the factfinder's decision, the Court did note that "the provision for a written record helps to assure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental human rights may have been abridged, will act fairly." *Id.*, at 565. We now hold that revocation of good time does not comport with "the minimum requirements of procedural due process," *id.*, at 558, unless the findings of the prison disciplinary board are supported by some evidence in the record.

The requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action. *E. g.*, *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961). Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. 418 U. S., at 561. This interest, however, must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Ibid.* Consequently, in identifying the safeguards required by due process, the Court has recognized the legitimate institutional needs of

assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation. See, *e. g.*, *Ponte* v. *Real*, 471 U. S. 491 (1985); *Baxter* v. *Palmigiano*, 425 U. S. 308, 321–322 (1976); *Wolff* v. *McDonnell*, *supra*, at 562–563.

Requiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens. In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. See, *e. g.*, *Douglas* v. *Buder*, 412 U. S. 430, 432 (1973) *(per curiam)* (revocation of probation); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 (1957) (denial of admission to bar); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 106 (1927) (deportation). Because the written statement mandated by *Wolff* requires a disciplinary board to explain the evidence relied upon, recognizing that due process requires some evidentiary basis for a decision to revoke good time credits will not impose significant new burdens on proceedings within the prison. Nor does it imply that a disciplinary board's factual findings or decisions with respect to appropriate punishment are subject to second-guessing upon review.

We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced . . . ." *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S., at 106. Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could sup-

port the conclusion reached by the disciplinary board. See *ibid.*; *United States ex rel. Tisi* v. *Tod*, 264 U. S. 131, 133–134 (1924); *Willis* v. *Ciccone*, 506 F. 2d 1011, 1018 (CA8 1974). We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. See *Wolff*, 418 U. S., at 562–563, 567–569. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, *id.*, at 556, and neither the amount of evidence necessary to support such a conviction, see *Jackson* v. *Virginia*, 443 U. S. 307 (1979), nor any other standard greater than some evidence applies in this context.

IV

Turning to the facts of this case, we conclude that the evidence before the disciplinary board was sufficient to meet the requirements imposed by the Due Process Clause. The disciplinary board received evidence in the form of testimony from the prison guard and copies of his written report. That evidence indicated that the guard heard some commotion and, upon investigating, discovered an inmate who evidently had just been assaulted. The guard saw three other inmates fleeing together down an enclosed walkway. No other inmates were in the area. The Supreme Judicial Court found that this evidence was constitutionally insufficient because it did not support an inference that more than one person had struck the victim or that either of the respondents was the assailant or otherwise participated in the assault. 392 Mass., at 203–204, 466 N. E. 2d, at 822. This conclusion, however, misperceives the nature of the evidence required by the Due Process Clause.

The Federal Constitution does not require evidence that logically precludes any conclusion but the one reached by the disciplinary board. Instead, due process in this context requires only that there be some evidence to support the findings made in the disciplinary hearing. Although the evidence in this case might be characterized as meager, and there was no direct evidence identifying any one of three inmates as the assailant, the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary. Respondents relied only upon the Federal Constitution, and did not claim that the disciplinary board's findings failed to meet evidentiary standards imposed by state law. See *id.*, at 199, n. 2, 466 N. E. 2d, at 819, n. 2; Brief for Respondents 17. Because the determination of the disciplinary board was not so lacking in evidentiary support as to violate due process, the judgment of the Supreme Judicial Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

The Attorney General of Massachusetts is a member of a favored class of litigants. As the highest legal officer of a sovereign State, his professional comments on the law of Massachusetts are accorded special respect.[1] Partly for that reason, and partly because this Court in recent years has been inclined to lend a sympathetic ear to claims that state courts have accorded too much protection to the rights of prison inmates and criminal defendants, State Attorneys General have been disproportionately successful in persuading this Court to grant their petitions for certiorari

[1] See *Marino* v. *Ragen*, 332 U. S. 561, 562 (1947) *(per curiam)*.

and to reverse state-court judgments of minimal national significance.[2]

Such favored treatment should give rise to a special duty to be meticulously forthright and accurate in advising the Court about relevant matters of state law affecting the specific questions that a State Attorney General asks this Court to review. A lawyer's greatest asset—his or her professional reputation—should not be squandered in order to achieve a favorable result in an individual case. I restate these simple truths because of my concern that the petitioner in this case and, indeed, the Court itself, may have attached greater importance to the correction of error in an isolated case than to the maintenance of standards that should govern procedures in this Court in all cases.

The Massachusetts Attorney General's petition for certiorari asked this Court to decide these two questions:

> "I. Whether prison inmates have a substantive due process right to judicial review of prison disciplinary board findings?
>
> "II. Whether, under the due process clause, the findings of a prison disciplinary board should be reviewed under a standard more stringent than review for action which is arbitrary, capricious, or an abuse of discretion?" Pet. for Cert. i.

Having granted certiorari and having had these two questions fully briefed and argued, the Court now correctly concludes that neither need be answered. It was obvious on the face of the Attorney General's petition for certiorari that the second question would not have merited review in this Court. That question—whether the Due Process Clause requires that a disciplinary board's findings of fact be reviewed under

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[2] See, *e. g.*, *Florida* v. *Rodriguez*, 469 U. S. 1 (1984) *(per curiam)*; *California* v. *Beheler*, 463 U. S. 1121 (1983) *(per curiam)*; *Illinois* v. *Batchelder*, 463 U. S. 1112 (1983) *(per curiam)*; *California* v. *Ramos*, 463 U. S. 992 (1983); *Illinois* v. *Andreas*, 463 U. S. 765 (1983).

a more stringent standard than abuse of discretion—is not presented because the Massachusetts court did not apply a more stringent standard.[3] The first question, however, may have merited our attention if there had been no state procedure for reviewing prison disciplinary board findings.

The first question in the Attorney General's certiorari petition was supported by the following argument: "A prison inmate has no general due process right to judicial review of disciplinary board findings for sufficiency of the evidence, and the creation of such a right is not consistent with those principles enunciated by this Court in the context of prison administration." Pet. for Cert. 14. Thus, although the right to judicial review was at the heart of the Attorney General's request that we grant certiorari, "somewhat inexplicably," *ante*, at 452, he did not mention that Massachusetts' law, wholly apart from the Federal Constitution, provides judicial review for the correction of errors "in proceedings

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[3] The Massachusetts court expressly declined to apply a standard different than "some evidence" in this case. Additionally, I note that virtually all Courts of Appeals that have ruled on the issue have concluded that some evidence must support a decision to revoke good-time credits. See, *e. g.*, *Adams* v. *Gunnell*, 729 F. 2d 362, 370 (CA5 1984); *Inglese* v. *Warden, U. S. Penitentiary*, 687 F. 2d 362, 363 (CA11 1982); *Willis* v. *Ciccone*, 506 F. 2d 1011, 1018, 1019, n. 11 (CA8 1974); cf. *Rusher* v. *Arnold*, 550 F. 2d 896, 899 (CA3 1977). One Circuit did adopt a "substantial evidence" standard a few years ago. *Aikens* v. *Lash*, 514 F. 2d 55, 60–61 (CA7 1975) ("The term 'substantial evidence' need not be something prison officials should be overly concerned about"), vacated and remanded, 425 U. S. 947, modified, 547 F. 2d 372 (1976). However, recent decisions of that court indicate that it may have modified the standard and that the modified version is applied much like the "some evidence" standard. See *Brown-Bey* v. *United States*, 720 F. 2d 467, 469 (CA7 1983); *Dawson* v. *Smith*, 719 F. 2d 896, 900 (CA7 1983); *Jackson* v. *Carlson*, 707 F. 2d 943, 949 (CA7), cert. denied *sub nom. Yeager* v. *Wilkinson*, 464 U. S. 861 (1983). In any event, this minor dispute hardly qualifies as a one of national importance. Cf. *Ponte* v. *Real*, 471 U. S. 491, 523, n. 21 (1985) (MARSHALL, J., dissenting) ("Reserving the argument docket for cases of truly national import would go far toward alleviating any workload problems allegedly facing the Court").

which . . . are not otherwise reviewable by motion or appeal." Mass. Gen. Laws Ann., ch. 249, § 4 (West Supp. 1984). Of course, we need not "decide in this case whether due process would require judicial review," *ante*, at 453, if state law provides judicial review, and the Court today correctly acknowledges this settled rule of judicial restraint. See *ante*, at 450–453. The Court's proper disposition of the primary question presented, however, does not adequately explain how this case arrived on our argument docket.

The Attorney General's petition for certiorari did not mention the existence of state procedures allowing judicial review. In his argument brief, the Attorney General did cite the state statute in a somewhat opaque footnote. See Brief for Petitioner 6, n. 2. That footnote, however, merely confirms the presumption that he was aware of his own State's procedure. Moreover, the Attorney General omitted any reference to the fact that less than one month before this case was argued before the Supreme Judicial Court of Massachusetts, that court rejected, in the context of a challenge to prison disciplinary hearings, the Attorney General's defense that "the *only* judicial review available to the plaintiffs is an action in the nature of certiorari pursuant to G. L. c. 249, § 4." *Nelson* v. *Commissioner of Correction*, 390 Mass. 379, 381–382, 387–388, n. 12, 456 N. E. 2d 1100, 1102, 1106, n. 12 (1983) (emphasis added).

"When the prison Superintendent petitioned for certiorari, he had a heavy burden of explaining why this Court should intervene in what amounts to a controversy between the Supreme Judicial Court of Massachusetts and that State's prison officials." *Ponte* v. *Real*, 471 U. S. 491, 502 (1985) (STEVENS, J., concurring). Even the casual student of this Court is aware that "[t]his Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," *Ross* v. *Moffitt*, 417 U. S. 600, 616–617 (1974), and that we "do not grant a certiorari to review evidence and discuss

specific facts." *United States* v. *Johnston*, 268 U. S. 220, 227 (1925).[4] It is not unreasonable to expect a State's highest legal officer to know the State's law and to bring to this Court's attention the rules of state law that might affect the sound exercise of our discretion to grant certiorari, or that might demonstrate that we granted the writ improvidently.[5]

The Court now recognizes that the Massachusetts Attorney General "somewhat inexplicably" failed to provide the Court with critical information about Massachusetts law, but that recognition does not affect its disposition of the case. In view of the fact that petitioner has not prevailed on either question that is presented by his certiorari petition, one might have expected the judgment of the Supreme Judicial Court of Massachusetts to be affirmed. The Court has frequently admonished litigants that they may not obtain a reversal on a ground not urged in the petition for certiorari.[6] Instead of following the practice dictated by our prior cases, however, the Court undertakes its own *de novo* review of the record and concludes that the evidence was not constitutionally insufficient.[7] I continue to believe that such a task is

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[4] *Ponte* v. *Real*, 471 U. S., at 501–502 (STEVENS, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket").

[5] Cf. *Board of License Comm'rs of Tiverton* v. *Pastore*, 469 U. S. 238 (1985) *(per curiam)*. See this Court's Rule 34.1(g) (a brief on the merits shall contain "a concise statement of the case containing all that is material to the consideration of the question presented"); Rule 35.5 (supplemental brief may be filed to point out "late authorities, newly enacted legislation, or other intervening matters").

[6] *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 428–429 (1964); *Carpenters* v. *NLRB*, 357 U. S. 93, 96 (1958); *Irvine* v. *California*, 347 U. S. 128, 129–130 (1954).

[7] Thus, the Court not only excuses the Attorney General's error but actually rewards him by acting as "the High Magistrate," *California* v. *Carney*, 471 U. S. 386, 396 (1985) (STEVENS, J., dissenting), and by reversing "fact-bound errors of minimal significance." *Ibid.*

not appropriate for this Court even if a diligent search will disclose error in the record. Cf. *United States* v. *Hasting*, 461 U. S. 499, 512 (1983) (STEVENS, J., concurring in judgment). I consider it particularly unwise to volunteer an advisory opinion on the sufficiency of the evidence when, on remand, the state court remains free to reinstate its judgment if it concludes that the evidence does not satisfy the standards required by state law.[8] Once again, however, the Court places a higher value on the rendition of a volunteered advisory opinion than on the virtues of judicial restraint.

Accordingly, while I join Parts I, II and III of the Court's opinion, I respectfully dissent from Part IV and its judgment.

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[8] Cf. *Massachusetts* v. *Upton*, 466 U. S. 727 (1984), on remand, *Commonwealth* v. *Upton*, 394 Mass. 363, 370–373, 476 N. E. 2d 548, 550–551 (1985); *California* v. *Ramos*, 463 U. S. 992 (1983), on remand, *People* v. *Ramos*, 37 Cal. 3d 136, 150–159, 689 P. 2d 430, 437–444 (1984), cert. denied, 471 U. S. 1119 (1985); *South Dakota* v. *Neville*, 459 U. S. 553 (1983), on remand, *State* v. *Neville*, 346 N. W. 2d 425, 427–429 (SD 1984); *Washington* v. *Chrisman*, 455 U. S. 1 (1982), on remand, *State* v. *Chrisman*, 100 Wash. 814, 817–822, 676 P. 2d 419, 422–424 (1984) (en banc).

MARYLAND *v.* MACON

CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 84–778. Argued April 17, 1985—Decided June 17, 1985

A county detective, who was not in uniform, entered an adult bookstore, browsed for several minutes, and purchased two magazines from respondent salesclerk with a marked $50 bill. The detective then left the store and showed the magazines to fellow officers who were waiting nearby. Upon concluding that the magazines were obscene, the detectives returned to the store, arrested respondent, and retrieved the marked $50 bill from the cash register, neglecting to return the change received at the time of the purchase. Prior to trial on a charge of distributing obscene materials in violation of a Maryland statute, the trial court denied respondent's motion to suppress the magazines and the $50 bill, holding that the purchase was not a seizure within the meaning of the Fourth Amendment and that the warrantless arrest was lawful. The magazines, but not the $50 bill, were introduced in evidence, and the jury found respondent guilty. The Maryland Court of Special Appeals reversed, holding that a warrant was required both to seize allegedly obscene materials and to arrest the distributor in order to provide a procedural safeguard for the First Amendment freedom of expression.

Held: The detectives did not obtain possession of the allegedly obscene magazines by means of an unreasonable search or seizure, and the magazines were not the fruit of an arrest, lawful or otherwise. Thus the magazines were properly admitted in evidence. Pp. 467–471.

(a) Absent some action taken by government agents that can properly be classified as a "search" or a "seizure," the Fourth Amendment rules designed to safeguard First Amendment freedoms do not apply. The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequented the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment. And the subsequent purchase was not a Fourth Amendment seizure, since a seizure occurs when there is some meaningful interference with an individual's possessory interests in the property seized, and here respondent voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials, does not come into play in cases where an under-

cover officer, by purchasing a few magazines, merely accepts an offer to do business that is freely made to the public. Nor was the bona fide nature of the purchase changed, so as to become tantamount to a warrantless seizure, when the officers later seized the marked $50 bill and failed to return the change. Objectively viewed, the transaction was a sale in the ordinary course of business, and the sale was not retrospectively transformed into a warrantless seizure by virtue of the officers' subjective intent to retrieve the purchase money to use as evidence. Pp. 468–471.

(b) Even assuming, *arguendo*, that respondent's warrantless arrest after the purchase of the magazines was an unreasonable seizure, it would not require exclusion of the magazines at trial. The exclusionary rule does not reach backward to taint information that was in official hands prior to any illegality. Here, the magazines were in police possession before the arrest, and the $50 bill, the only fruit of the arrest, was not introduced in evidence. P. 471.

57 Md. App. 705, 471 A. 2d 1090, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 472.

Deborah K. Chasanow argued the cause for petitioner. With her on the briefs were *Stephen H. Sachs*, Attorney General of Maryland, and *Anne E. Singleton*, Assistant Attorney General.

Burton W. Sandler argued the cause for respondent. With him on the brief was *Joseph L. Gibson.**

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether allegedly obscene magazines purchased by undercover officers shortly before

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**Solicitor General Lee*, *Assistant Attorney General Trott*, and *Deputy Solicitor General Frey* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger* and *Shirley Adelson Siegel;* and for the American Civil Liberties Union by *Burt Neuborne.*

the warrantless arrest of a salesclerk must be excluded from evidence at the clerk's subsequent trial for distribution of obscene materials. Following a jury trial in the Circuit Court of Prince George's County, Maryland, respondent was convicted of distribution of obscene materials in violation of Md. Ann. Code, Art. 27, § 418 (1982). The Maryland Court of Special Appeals reversed the conviction and ordered the charges dismissed on the ground that the magazines were improperly admitted in evidence. 57 Md. App. 705, 471 A. 2d 1090 (1984). The Maryland Court of Appeals denied certiorari. 300 Md. 795, 481 A. 2d 240 (1984). We granted certiorari, 469 U. S. 1156 (1985), to resolve a conflict among the state courts on the question whether a purchase of allegedly obscene matter by an undercover police officer constitutes a seizure under the Fourth Amendment. Finding that it does not, we reverse.

I

On May 6, 1981, three Prince George's County police detectives went to the Silver News, Inc., an adult bookstore in Hyattsville, Maryland, as part of a police investigation of adult bookstores in the area. One of the detectives, who was not in uniform, entered the store, browsed for several minutes, and purchased two magazines from a clerk, Baxter Macon, with a marked $50 bill. The detective left the store and showed the two magazines to his fellow officers who were waiting nearby. Together they concluded that the magazines were obscene under the criteria previously used by them in warrant applications. The detectives returned to the store, arrested respondent Macon, who was the only attendant in the store, and retrieved from the cash register the $50 bill that had been used to make the purchase. The officers neglected to return the change received at the time of the purchase. Respondent escorted the remaining customers out and closed the bookstore before leaving with the detectives.

Prior to trial, Macon moved to suppress the magazines purchased by the officers and the $50 bill used to make the purchase. App. 21. The trial judge denied the motion on the grounds that the purchase was not a seizure within the meaning of the Fourth Amendment and that the warrantless arrest was lawful. *Id.*, at 52. The magazines, but not the $50 bill, were subsequently introduced in evidence at trial. The jury found respondent guilty of distributing obscene materials. Respondent appealed, contending that a prior judicial determination of probable cause to believe the matter distributed was obscene was required to sustain a seizure and an arrest on charges related to obscenity. Absent such a determination, respondent argued, the allegedly obscene materials must be suppressed and the charges must be dismissed. Respondent did not challenge the jury's finding that the magazines were obscene.

The Maryland Court of Special Appeals agreed that a warrant is required both to seize allegedly obscene materials and to arrest the distributor in order to provide a procedural safeguard for the First Amendment freedom of expression. 57 Md. App., at 710, 471 A. 2d, at 1092. In cases involving First Amendment rights, the court reasoned, Fourth Amendment safeguards, including suppression of material acquired in connection with a warrantless arrest, must be applied more stringently. *Ibid.* The court determined that the purchase of the magazines was a "constructive" seizure and that the proper remedy was to exclude the magazines from evidence at the subsequent trial. *Id.*, at 716, 471 A. 2d, at 1096. Alternatively, the court held that the warrantless arrest of respondent on obscenity charges required the exclusion of the publications from evidence. *Id.*, at 719, 471 A. 2d, at 1097. The court accordingly reversed the conviction and ordered that the charges be dismissed because without the magazines the evidence was insufficient to sustain a conviction. *Ibid.*

By holding that the purchase constituted a seizure within the meaning of the Fourth Amendment, the Maryland Court of Special Appeals rejected the position taken by the majority of state courts that have considered the issue. In evaluating the undercover purchase of allegedly obscene materials, most state courts have treated as self-evident the proposition that a purchase by an undercover officer is not a seizure, regardless of whether the funds used to make the purchase are later retrieved as evidence. See, *e. g.*, *Baird* v. *State*, 12 Ark. App. 71, 671 S. W. 2d 191 (1984) (en banc); *Wood* v. *State*, 144 Ga. App. 236, 240 S. E. 2d 743 (1977), cert. denied, 439 U. S. 899 (1978); *People* v. *Ridens*, 51 Ill. 2d 410, 282 N. E. 2d 691 (1972), vacated and remanded on other grounds, 413 U. S. 912 (1973); *State* v. *Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974); *State* v. *Perry*, 567 S. W. 2d 380 (Mo. App. 1978); *State* v. *Dornblaser*, 26 Ohio Misc. 29, 267 N. E. 2d 434 (1971); *Cherokee News & Arcade, Inc.* v. *State*, 533 P. 2d 624 (Okla. Crim. App. 1974). But see *State* v. *Furuyama*, 64 Haw. 109, 637 P. 2d 1095 (1981) (reaching the contrary conclusion).

For the reasons set forth below, we conclude that the officer's entry into the bookstore and later examination of materials offered for sale there did not constitute a search and that the purchase of two magazines did not effect a seizure. We do not decide whether a warrant is required to arrest a suspect on obscenity-related charges, because the magazines at issue were not the product of the warrantless arrest. Because we hold that the magazines were properly admitted in evidence at trial, we also do not address respondent's contention that the Double Jeopardy Clause bars retrial.

II

The central issue presented is whether the magazines purchased by the undercover detectives before respondent's arrest must be suppressed. If the publications were ob-

tained by means of an unreasonable search or seizure, or were the fruits of an unlawful arrest, the Fourth Amendment requires their exclusion from evidence. If, however, the evidence is not traceable to any Fourth Amendment violation, exclusion is unwarranted. See *United States* v. *Crews*, 445 U. S. 463, 472 (1980).

A

The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 326, n. 5 (1979), and requires that the Fourth Amendment be applied with "scrupulous exactitude" in such circumstances. *Stanford* v. *Texas*, 379 U. S. 476, 485 (1965). Consequently, the Court has imposed particularized rules applicable to searches for and seizures of allegedly obscene films, books, and papers. See, *e. g.*, *Roaden* v. *Kentucky*, 413 U. S. 496, 497 (1973) ("seizure of allegedly obscene material, contemporaneous with and as an incident to an arrest for the public exhibition of such material . . . may [not] be accomplished without a warrant"); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961) (warrant to seize allegedly obscene magazines must be particularized and may not issue merely on officer's conclusory assertion). Although we have not previously had an occasion to analyze the question whether a purchase of obscene material is properly classified as a seizure, some prior cases have involved seizures that followed bona fide undercover purchases. See, *e. g.*, *Lo-Ji Sales, Inc.* v. *New York*, *supra*; *Marcus* v. *Search Warrant*, *supra*. In those cases, the Court did not address the exclusion of the purchased materials, but only of the materials obtained through mass seizures conducted pursuant to unconstitutional open-ended warrants. Absent some action taken by government agents that can properly be classified as a "search" or a "seizure," the Fourth Amendment rules designed to safeguard First Amendment freedoms do not

apply. Cf. *Lo-Ji Sales, Inc.* v. *New York, supra,* at 326, n. 5; *Roaden* v. *Kentucky, supra,* at 505 (sheriff seized a film from a commercial theater currently screening it).

A search occurs when "an expectation of privacy that society is prepared to consider reasonable is infringed." *United States* v. *Jacobsen,* 466 U. S. 109, 113 (1984). Here, respondent did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and to transact business. Cf. *United States* v. *Knotts,* 460 U. S. 276, 281–282 (1983). The mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable. Cf. *United States* v. *Jacobsen, supra,* at 122–123, n. 22. The officer's action in entering the bookstore and examining the wares that were intentionally exposed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment. See *Katz* v. *United States,* 389 U. S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection").

Nor was the subsequent purchase a seizure within the meaning of the Fourth Amendment. A seizure occurs when "there is some meaningful interference with an individual's possessory interests" in the property seized. *United States* v. *Jacobsen, supra,* at 113. Here, respondent voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds. Cf. *Lewis* v. *United States,* 385 U. S. 206, 210 (1966). Thereafter, whatever possessory interest the seller had was in the funds, not the magazines. At the time of the sale the officer did not "interfere" with any interest of the seller; he took only that which was intended as a necessary part of the exchange. See *id.,* at 211.

The use of undercover officers is essential to the enforcement of vice laws. *Id.*, at 210, n. 6. An undercover officer does not violate the Fourth Amendment merely by accepting an offer to do business that is freely made to the public. "A government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id.*, at 211; cf. *Lo-Ji Sales, Inc.* v. *New York*, *supra*, at 329. Nor does the First Amendment suggest a different conclusion in this case. Although a police officer may not engage in a "wholesale searc[h] and seizur[e]" in these circumstances, *Lo-Ji Sales, Inc.* v. *New York*, *supra*, at 329, nothing in our cases renders invalid under the Fourth Amendment or the First Amendment the purchase as here by the police of a few of a large number of magazines and other materials offered for sale. The risk of prior restraint, which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizures of First Amendment materials, does not come into play in such cases, and the purchase is analogous to purchases of other unlawful substances previously found not to violate the Fourth Amendment. See *Lewis* v. *United States*, *supra*, at 210 (purchase of narcotics).

Notwithstanding that the magazines were obtained by a purchase, respondent argues that the bona fide nature of the purchase evaporated when the officers later seized the marked $50 bill and failed to return the change. Brief for Respondent 10. When the officer subjectively intends to retrieve the money while retaining the magazines, respondent maintains, the purchase is tantamount to a warrantless seizure. *Id.*, at 11. This argument cannot withstand scrutiny. Whether a Fourth Amendment violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," *Scott* v. *United States*, 436 U. S. 128, 136 (1978), and not on the officer's actual state of mind at the time the chal-

lenged action was taken. *Id.*, at 138 and 139, n. 13. Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence. Assuming, *arguendo*, that the retrieval of the money incident to the arrest was wrongful, the proper remedy is restitution or suppression of the $50 bill as evidence of the purchase, not exclusion from evidence of the previously purchased magazines.

B

The question remains whether respondent's warrantless arrest after the purchase of the magazines requires their exclusion at trial. Again, assuming, *arguendo*, that the warrantless arrest was an unreasonable seizure in violation of the Fourth Amendment—a question we do not decide—it yielded nothing of evidentiary value that was not already in the lawful possession of the police. "The exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained; it does not reach backward to taint information that was in official hands prior to any illegality." *United States* v. *Crews*, 445 U. S., at 475 (opinion of BRENNAN, J., joined by Stewart, and STEVENS, JJ.). Here, the magazines were in police possession before the arrest, and the $50 bill, the only fruit of the arrest, was not introduced in evidence. We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials.

Because the undercover agents did not obtain possession of the allegedly obscene magazines by means of an unreasonable search or seizure and the magazines were not the fruit of an arrest, lawful or otherwise, the magazines were properly admitted in evidence at respondent's trial for distribution of obscene materials. The judgment of the Maryland Court of Special Appeals is reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court granted certoriari to consider the holding of the Court of Special Appeals of Maryland that the First and Fourth Amendments require evidentiary suppression of certain magazines obtained in the course of an investigation culminating in the warrantless arrest of respondent on obscenity charges. The statute under which the prosecution was brought[1] is, in my view, unconstitutionally overbroad and therefore facially invalid in its entirety. See my dissent in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973). For this reason, I would affirm the judgment of the Court of Special Appeals invalidating respondent's conviction. Even if I thought otherwise with respect to the constitutionality of the Maryland obscenity statute, however, I would not join today's opinion because I disagree with the Court's analysis of whether respondent's warrantless arrest should lead to a reversal of his conviction in this case.

I

"The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new." *Marcus* v. *Search Warrant*, 367 U. S. 717, 724 (1961). "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.*, at 729. See also *Stanford* v. *Texas*, 379 U. S. 476, 481–485 (1965). Thus in enforcing the Fourth Amendment's command, courts must exercise a "scrupulous exactitude" to ensure that official use of the power to search and seize poses no threat to the liberty of expression. *Id.*, at 485. In the words of THE CHIEF JUSTICE, "[t]he setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment,

[1] Md. Ann. Code, Art. 27, § 418 (1982).

invokes such Fourth Amendment . . . requirements because we examine what is 'unreasonable' in light of the values of freedom of expression." *Roaden* v. *Kentucky*, 413 U. S. 496, 504 (1973).

An official seizure of presumptively protected books, magazines, or films is not "reasonable" within the meaning of the Fourth Amendment unless a neutral and detached magistrate has issued a warrant particularly describing the things to be seized, *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319 (1979); *Stanford* v. *Texas*, *supra*, and the probable-cause determination supporting the warrant is based on a proceeding in which the magistrate has the opportunity to "focus searchingly on the question of obscenity," *Marcus* v. *Search Warrant*, *supra*, at 732; see also *Roaden* v. *Kentucky*, *supra*; *Heller* v. *New York*, 413 U. S. 483 (1973); *Lee Art Theatre* v. *Virginia*, 392 U. S. 636 (1968). These strict requirements reflect a judgment that the inherently difficult decision respecting whether particular material is obscene can under no circumstances properly be left to investigating authorities "engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U. S. 10, 14 (1948). The difficulty of applying the arcane standards governing obscenity determinations exacerbates the risk of overzealous use of the power to search and seize. *Marcus* v. *Search Warrant*, *supra*, at 732. And the consequence of such a seizure is a restraint on the distribution of presumptively protected materials. "[W]ithout the authority of a constitutionally sufficient warrant, [seizure] is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards." *Roaden* v. *Kentucky*, *supra*, at 504.

Because official seizure of allegedly obscene books, magazines, and films requires a prior judicial determination of probable obscenity, it follows that seizure of a person for allegedly distributing such materials must meet the same requirements. A warrantless arrest involves the same diffi-

culties and poses the same risks as does a warrantless seizure of books, magazines, or films. An officer in the field faces the same daunting task of applying the standards of *Miller* v. *California*, 413 U. S. 15 (1973), in determining whether books or magazines offered for sale support a finding of probable cause sufficient to justify the obscenity arrest. And the situation poses the same risk that the officer's zeal to enforce the law will lead to erroneous judgments with respect to the obscenity of material that is constitutionally protected. Permitting this investigative practice threatens to restrain the liberty of expression in the same way that seizure of presumptively protected material does.

The disruptive potential of an effectively unbounded power to arrest should be apparent. In this case, for example, the arrest caused respondent to usher out patrons and padlock the entrance to the bookstore. As in *Roaden* the official conduct "brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition." 413 U. S., at 504. Several cases from the lower courts make plain that the systematic use of an unbridled power to arrest alone provides a potent means for harassing those who sell books and magazines that do not conform to the majority's dictates of taste. See, *e. g.*, *Penthouse International, Ltd.* v. *McAuliffe*, 610 F. 2d 1353 (CA5 1980); *State* v. *Furayama*, 64 Haw. 109, 637 P. 2d 1095 (1981). Indeed, requiring a warrant for seizures of presumptively protected materials would be pointless if the authorities could achieve an equally effective restraint on distribution by the simple expedient of a warrantless seizure of the seller of such materials.

In *Roaden* v. *Kentucky*, *supra*, this Court required suppression at trial of a film seized incident to a warrantless arrest of a theater owner on obscenity charges. Although the Court today suggests that the infirmity at issue in *Roaden* was the officer's failure to obtain a warrant prior to seizing the film, *ante*, at 468, *Roaden* never specified whether the seizure of the person or the seizure of the film

was invalid for lack of a warrant. What concerned the Court was the absence of any prior judicial determination of probable cause to believe the film was obscene: "Nothing prior to seizure afforded a magistrate an opportunity to 'focus searchingly on the question of obscenity.'" 413 U. S., at 506. Whether that determination would have formed the basis of an arrest warrant or a warrant authorizing seizure of the film is perhaps immaterial. *Roaden* does make clear, however, that officials may seize neither persons nor books, magazines, and films without some prior judicial determination of probable cause. That is precisely what happened in the present case, and the warrantless arrest is therefore clearly illegal. The Court today works mischief by unnecessarily throwing this principle into doubt.

The Court compounds the mischief by leaving respondent without an effective remedy for his illegal arrest. The Maryland Court of Special Appeals suppressed the two purchased magazines in part to ensure an effective remedy for the arrest. Holding that the magazines were legally purchased prior to the arrest and therefore can in no sense be considered tainted "fruits" of that arrest, this Court will neither suppress the magazines nor invalidate respondent's conviction. The Court is of course following precedents, applicable to the run of cases, holding that the illegality of an arrest in itself will not suffice to prevent the introduction of evidence lawfully obtained prior to the arrest, *United States* v. *Crews*, 445 U. S. 463, 472–473 (1980), or to invalidate a conviction, *id.*, at 474; see also *Frisbie* v. *Collins*, 342 U. S. 519 (1952).

When First Amendment values are at stake mechanical application of these precedents is inappropriate. No logical imperative requires the rule of *Frisbie* v. *Collins*. Even under the methodology to which this Court has recently wedded itself in *United States* v. *Leon*, 468 U. S. 897, 906–908 (1984)—a methodology about which I have grave doubts, see *id.*, at 930 (BRENNAN, J., dissenting); *New Jersey*

v. *T. L. O.*, 469 U. S. 325, 357–358 (1985) (BRENNAN, J., dissenting)—the question of the proper remedy for government illegality is a matter of judgment, a balance of the State's interest in law enforcement and the citizen's interest in protection from unreasonable official overreaching. See also *United States* v. *Crews*, *supra*, at 474, n. 20. In most cases the incremental deterrent of invalidating a conviction as a result of an illegal arrest might not justify the added "interference with the public interest in having the guilty brought to book." *United States* v. *Blue*, 384 U. S. 251, 255 (1966). In cases like the present one, however, an additional and countervailing public interest in ensuring the broad exercise of First Amendment freedoms must enter the calculus. For the consequences of illegal use of the power of arrest fall not only upon the specific victims of abuse of that power but also upon all those who, for fear of being subjected to official harassment, steer far wider of the forbidden zone than they otherwise would. Such a result would infringe not only the rights of those who would otherwise engage in such expression but also the rights of those who would otherwise receive such expression. The deterrent to protected expression that such a regime would work demands an effective remedy in the form of invalidation of obscenity convictions based on arrests unsupported by any prior judicial determination of probable cause. Such a rule finds its source in the commands of both the First and Fourth Amendments. See *ibid.* Cf. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963). Opting for the contrary course, the Court today sanctions an end run around constitutional requirements carefully crafted to guard our liberty of expression.

II

The Court's endorsement of the government's abuse of the arrest power as a means to enforce norms of taste in written and visual forms of expression is disquieting in its own right because the consequence inevitably will be suppression of

protected nonobscene expression. When one recognizes that the same official use of the power to search and seize sanctioned today in its application against the sexual nonconformist can be instantly turned against the political nonconformist, see *Stanford* v. *Texas*, 379 U. S. 476 (1965), this decision takes on a particularly ominous cast. These "stealthy encroachments"[2] upon our liberties sanctioned in the State's present effort to combat vice may become potent weapons in a future effort to shackle political dissenters and stifle their voices. In deciding cases such as this one, the Court would do well to remember that "[u]ncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U. S. 160, 180 (1949) (Jackson, J., dissenting).

I dissent.

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[2] *Boyd* v. *United States*, 116 U. S. 616, 635 (1886).

JENSEN, DIRECTOR, DEPARTMENT OF MOTOR VEHICLES OF NEBRASKA, ET AL. *v.* QUARING

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83–1944. Argued January 7, 1985—Decided June 17, 1985

728 F. 2d 1121, affirmed by an equally divided Court.

Ruth Anne E. Galter, Assistant Attorney General of Nebraska, argued the cause for petitioners. With her on the brief was *Paul L. Douglas*, Attorney General.

Thomas C. Lansworth argued the cause for respondent. With him on the brief were *Burt Neuborne* and *Charles S. Sims*.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

JUSTICE POWELL took no part in the decision of this case.

**Marc D. Stern* and *Ronald A. Krauss* filed a brief for the American Jewish Congress et al. as *amici curiae* urging affirmance.

Solicitor General Lee, *Deputy Solicitor General Geller*, and *Kathryn A. Oberly* filed a brief for the United States as *amicus curiae*.

McDONALD *v.* SMITH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84–476. Argued March 20, 1985—Decided June 19, 1985

Respondent filed a libel action against petitioner in a North Carolina state court under the common law of that State, alleging that while respondent was being considered for the position of United States Attorney, petitioner wrote two letters to President Reagan (and sent copies to other Government officials) containing "false, slanderous, libelous, inflammatory and derogatory statements" concerning respondent, and that petitioner knew that the statements were false and maliciously intended to injure respondent by undermining his prospect of being appointed United States Attorney. Seeking compensatory and punitive damages, respondent also alleged, *inter alia*, that the letters had their intended effect, resulting in his not being appointed, and that his reputation and career as an attorney were injured. Petitioner removed the case to Federal District Court on the basis of diversity of citizenship and then moved for judgment on the pleadings on the ground that the Petition Clause of the First Amendment—which guarantees "the right of the people . . . to petition the Government for a redress of grievances"—provided absolute immunity from liability. The District Court held that the Clause does not grant absolute immunity, and the Court of Appeals affirmed.

Held:

1. The Petition Clause does not provide absolute immunity to defendants charged with expressing libelous and damaging falsehoods in petitions to Government officials. Although the value in the right of petition as an important aspect of self-government is beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel. In 1845 this Court, after reviewing the common law, held in *White* v. *Nicholls*, 3 How. 266, that a petition to a Government official was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause," and nothing has been presented to suggest that that holding should be altered. Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. The Clause was inspired by the same ideals of liberty and democracy that resulted in the First Amendment freedoms to speak, publish, and assemble, and there is no

sound basis for granting greater constitutional protection to statements made in a petition than other First Amendment expressions. Pp. 482–485.

2. Under North Carolina common law, damages may be recovered only if petitioner is shown to have acted with "malice," as defined in terms that the North Carolina Court of Appeals considered to be consistent with *New York Times Co.* v. *Sullivan*, 376 U. S. 254. The Petition Clause does not require the State to expand this privilege into an absolute one. P. 485.

737 F. 2d 427, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the decision of the case. BRENNAN, J., filed a concurring opinion, in which MARSHALL and BLACKMUN, JJ., joined, *post*, p. 485.

Bruce J. Ennis, Jr., argued the cause for petitioner. With him on the brief were *Paul R. Friedman* and *Geoffrey P. Miller.*

William A. Eagles argued the cause for respondent. With him on the brief was *B. F. Wood.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Petition Clause of the First Amendment provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States.

I

In July 1981, respondent commenced a libel action against petitioner in state court under the common law of North Carolina. Respondent alleged that while he was being considered for the position of United States Attorney, petitioner

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**Charles S. Sims* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

wrote two letters to President Reagan.[1] The complaint alleges that these letters "contained false, slanderous, libelous, inflammatory and derogatory statements" concerning respondent. App. 4–5. In particular, the complaint states that the letters falsely accused respondent of "violating the civil rights of various individuals while a Superior Court Judge," "fraud and conspiracy to commit fraud," "extortion or blackmail," and "violations of professional ethics." *Id.*, at 5–6. Respondent alleged that petitioner knew that these accusations were false, and that petitioner maliciously intended to injure respondent by undermining his prospect of being appointed United States Attorney.

The complaint alleges that petitioner mailed copies of the letters to Presidential Adviser Edwin Meese, Senator Jesse Helms, Representative W. E. Johnston, and three other officials in the Executive and Legislative Branches.[2] It further alleges that petitioner's letters had their intended effect: respondent was not appointed United States Attorney, his reputation and career as an attorney were injured, and he "suffered humiliation, embarrassment, anxiety and mental anguish." *Id.*, at 6. Respondent sought compensatory and punitive damages of $1 million.

Petitioner removed the case to the United States District Court on the basis of diversity of citizenship. He then moved for judgment on the pleadings on the ground that the Petition Clause of the First Amendment provides absolute

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[1] The first letter, dated December 1, 1980, was written to Ronald Reagan as "President-Elect of the United States." App. 8. The second letter was dated February 13, 1981, and directed to President Reagan. *Id.*, at 14. Petitioner described himself as a "politically active American" who has owned and operated three child-care centers in North Carolina since 1970. *Id.*, at 8.

[2] Copies of the December 1, 1980, letter were purportedly sent to Representatives Jack Kemp and Barry Goldwater, Jr. The Director of the Federal Bureau of Investigation, William Webster, allegedly received a copy of the letter dated February 13, 1981.

immunity. The District Court agreed with petitioner that his communications fell "within the general protection afforded by the petition clause," 562 F. Supp. 829, 838–839 (MDNC 1983), but held that the Clause does not grant absolute immunity from liability for libel. The Fourth Circuit, relying on this Court's decision in *White* v. *Nicholls*, 3 How. 266 (1845), affirmed.[3] 737 F. 2d 427 (1984).

We granted certiorari, 469 U. S. 1032 (1984), and we affirm.

II

The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States* v. *Cruikshank*, 92 U. S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.*, at 552. And James Madison made clear in the congressional debate on the proposed amendment that people "may communicate their will" through direct petitions to the legislature and government officials. 1 Annals of Cong. 738 (1789).

The historical roots of the Petition Clause long antedate the Constitution. In 1689, the Bill of Rights exacted of William and Mary stated: "[I]t is the Right of the Subjects to petition the King." 1 Wm. & Mary, Sess. 2, ch. 2. This idea reappeared in the Colonies when the Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances. See 1 B. Schwartz, The Bill of Rights—A Documentary History 198 (1971). And the Declarations of Rights enacted by many

[3] Because petitioner raised a "serious and unsettled question" concerning absolute immunity, 737 F. 2d, at 428, the Court of Appeals accepted jurisdiction under the "collateral order" doctrine. See *Nixon* v. *Fitzgerald*, 457 U. S. 731, 742–743 (1982). Given the preliminary nature of this petition for certiorari, we do not address petitioner's request for attorney's fees should he ultimately prevail.

state conventions contained a right to petition for redress of grievances. See, *e. g.*, Pennsylvania Declaration of Rights (1776).

Although the values in the right of petition as an important aspect of self-government are beyond question, it does not follow that the Framers of the First Amendment believed that the Petition Clause provided absolute immunity from damages for libel. Early libel cases in state courts provide no clear evidence of the nature of the right to petition as it existed at the time the First Amendment was adopted; these cases reveal conflicting views of the privilege afforded expressions in petitions to government officials.

The plaintiff in the Vermont case of *Harris* v. *Huntington*, 2 Tyler 129 (1802), brought a libel action complaining of the defendant's petition to the legislature that he not be reappointed as a justice of the peace. The court, based on its understanding of "the right of petitioning the supreme power," granted the defendant's request for an "absolute and unqualified immunity from all responsibility." *Id.*, at 139–140. This absolute position of the Vermont court reflected an early English view,[4] but was not followed by the courts of other States. See, *e. g.*, *Commonwealth* v. *Clapp*, 4 Mass. 163, 169 (1808). Indeed, Justice Yeates of the Supreme Court of Pennsylvania stated in *Gray* v. *Pentland*, 2 Serg. & R. 23 (1815), that

> "an individual, who *maliciously*, *wantonly*, and *without probable cause*, asperses the character of a public officer in a written or printed paper, delivered to those who are invested with the power of removing him from office, is responsible to the party injured in damages, although such paper is masked under the specious cover of investigating the conduct of such officer for the general good. Public policy demands no such sacrifice of the rights of

[4] See *Lake* v. *King*, 1 Wms. Saund. 131, 85 Eng. Rep. 137 (K. B. 1680). In *White* v. *Nicholls*, 3 How. 266, 289 (1845), this Court described *Lake* v. *King* as a "seemingly anomalous decision."

persons in an official capacity, nor will the law endure such a mockery of its justice." *Id.*, at 25 (emphasis in original).

In *White* v. *Nicholls*, *supra*, this Court dealt with the proper common-law privilege for petitions to the Government. The plaintiff in *White* brought a libel action based on letters written by Nicholls urging the President of the United States to remove the plaintiff from office as a customs inspector. The Court, after reviewing the common law, concluded that the defendant's petition was actionable if prompted by "express malice," which was defined as "falsehood and the absence of probable cause." *Id.*, at 291. Nothing presented to us suggests that the Court's decision not to recognize an absolute privilege in 1845 should be altered; we are not prepared to conclude, 140 years later, that the Framers of the First Amendment understood the right to petition to include an unqualified right to express damaging falsehoods in exercise of that right.[5]

Nor do the Court's decisions interpreting the Petition Clause in contexts other than defamation indicate that the right to petition is absolute. For example, filing a complaint in court is a form of petitioning activity; but "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 743 (1983); accord, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 513 (1972). Similarly, petitions to the President that contain intentional and reckless falsehoods "do not enjoy constitutional protection," *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964), and may, as in *White* v. *Nicholls*, *supra*, be reached by the law of libel.

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[5] Basic aspects of the right to petition were under attack in England in the 1790's. In response to an assembly of 150,000 persons petitioning for various reforms, Parliament outlawed public meetings of more than 50 persons held to petition the King, "except in the presence of a magistrate with authority to arrest everybody present." I. Brant, The Bill of Rights 245 (1965).

To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. See *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222 (1967). These First Amendment rights are inseparable, *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945), and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.

III

Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; "malice" has been defined by the Court of Appeals of North Carolina, in terms that court considered consistent with *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), as "knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand." *Dellinger* v. *Belk*, 34 N. C. App. 488, 490, 238 S. E. 2d 788, 789 (1977). We hold that the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not. The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring.

New York Times Co. v. *Sullivan*, 376 U. S. 254, 279–280 (1964), held that a public official may recover damages for a false statement concerning his official conduct only where the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." This standard, explicitly di-

rected toward protection of "freedom of speech and of the press," *id.*, at 264, reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *id.*, at 270.

The petitioner Robert McDonald contends that when a citizen communicates directly with Government officials about matters of public importance—here the qualifications of a candidate for United States Attorney—the First Amendment's Petition Clause requires courts in defamation actions to accord an *absolute* privilege to such communications rather than the qualified privilege defined in *New York Times*. I fully agree with the Court that the Petition Clause imposes no such absolute privilege.

McDonald correctly notes that the right to petition the Government requires stringent protection. "The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States* v. *Cruikshank*, 92 U. S. 542, 552 (1876). The right to petition is "among the most precious of the liberties guaranteed by the Bill of Rights," *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 222 (1967), and except in the most extreme circumstances citizens cannot be punished for exercising this right "without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions," *De Jonge* v. *Oregon*, 299 U. S. 353, 364 (1937). As with the freedoms of speech and press, exercise of the right to petition "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." *New York Times Co.* v. *Sullivan*, *supra*, at 270–271. The First Amendment requires that we extend substantial "'breathing space'" to such expression, because a rule imposing liability whenever a statement was accidently or negligently incorrect would

intolerably chill "would-be critics of official conduct . . . from voicing their criticism." 376 U. S., at 272, 279.[1]

We have not interpreted the First Amendment, however, as requiring protection of *all* statements concerning public officials.

> "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even to topple an administration. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .' *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison* v. *Louisiana*, 379 U. S. 64, 75 (1964).

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[1] To safeguard the First Amendment's values, "defeasance of the privilege" set forth in *New York Times* "is conditioned, not on mere negligence, but on reckless disregard for the truth." *Garrison* v. *Louisiana*, 379 U. S. 64, 79 (1964).

McDonald argues that, for two reasons, this qualification of the right vigorously to criticize public officials should not apply to expression falling within the scope of the Petition Clause.[2] First, he contends that petitioning historically was accorded an absolute immunity and that the Framers included the Petition Clause in the First Amendment on this understanding. I agree with the Court that the evidence concerning 17th- and 18th-century British and colonial practice reveals, at most, "conflicting views of the privilege afforded expressions in petitions to government officials," *ante*, at 483, and does not persuasively demonstrate the Framers' intent to accord absolute immunity to petitioning.

Second, McDonald argues that criticism of public officials under the Petition Clause is functionally different from, and therefore entitled to greater protection than, criticism of officials falling within the protection of the First Amendment's Speech and Press Clauses. Specifically, he contends that "*[u]nlike the more general freedoms of speech and press*, the right to petition was understood by the Framers of the Constitution and the First Amendment to be a necessary right of a self-governing people," and that "when the citizen is not speaking to the public at large, but is directly

[2] For purposes of applying an absolute immunity in the Petition Clause context, McDonald suggests that we need consider only those expressions that "touc[h] on" and are "relevant to" the official conduct of public servants, and that are "contained in a private petition to federal officials who [have] authority to take responsive actions." Brief for Petitioner 7, and n. 7. The Court long ago concluded, however, that the Petition Clause embraces a much broader range of communications addressed to the executive, the legislature, courts, and administrative agencies. See, *e. g.*, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U. S. 731, 741 (1983); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U. S. 508, 510 (1972). It also includes such activities as peaceful protest demonstrations. See, *e. g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 909–912 (1982); *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963). Expression falling within the Petition Clause will thus frequently also be protected by the First Amendment freedoms of speech, press, and assembly. See also *Adderley* v. *Florida*, 385 U. S. 39, 49–51 (1966) (Douglas, J., dissenting).

exercising his right to petition, [he] is thus performing a self-governmental function." Brief for Petitioner 7, 30 (emphasis added). Such a distinction is untenable. The Speech and Press Clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance. A citizen who criticizes a public official is shielded by the Speech and Press Clauses because "[i]t is as much his *duty* to criticize as it is the official's duty to administer." *New York Times Co.* v. *Sullivan*, 376 U. S., at 282 (emphasis added). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, *supra*, at 74–75.[3]

The Framers envisioned the rights of speech, press, assembly, and petitioning as interrelated components of the public's exercise of its sovereign authority. As Representative James Madison observed during the House of Representatives' consideration of the First Amendment:

> "The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this Government; the people may therefore publicly address their representatives, may privately advise them, or declare their sentiments by petition to the whole body; *in all these ways they may communicate their will.*" 1 Annals of Cong. 738 (1789) (emphasis added).

The Court previously has emphasized the essential unity of the First Amendment's guarantees:

> "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single

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[3] Thus the advertisement at issue in *New York Times*, every bit as much as the letter to President Reagan at issue here, "communicated information, expressed opinion, recited grievances, [and] protested claimed abuses"—expression essential "'to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.'" *New York Times Co.* v. *Sullivan*, 376 U. S., at 266, 269.

> guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurance." *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

And although we have not previously addressed the precise issue before us today, we have recurrently treated the right to petition similarly to, and frequently as overlapping with, the First Amendment's other guarantees of free expression. See, *e. g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 909–912, 915 (1982); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S., at 221–222; *Adderley* v. *Florida*, 385 U. S. 39, 40–42 (1966); *Edwards* v. *South Carolina*, 372 U. S. 229, 234–235 (1963); *NAACP* v. *Button*, 371 U. S. 415, 429–431 (1963).

There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co.* v. *Sullivan*, is not shielded by an absolute privilege. I therefore join the Court's opinion.

BROCKETT *v.* SPOKANE ARCADES, INC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–28. Argued February 20, 1985—Decided June 19, 1985*

A Washington statute declares to be a "moral nuisance" any place "where lewd films are publicly exhibited as a regular course of business" or "in which lewd publications constitute a principal part of the stock in trade." The statute provides that "lewd matter" is synonymous with "obscene matter" and defines these terms to mean, *inter alia*, any matter which the average person, applying contemporary community standards, would find, when considered as a whole, "appeals to the prurient interest." "Prurient" is defined to mean "that which incites lasciviousness or lust." Appellees—various individuals and corporations who purvey sexually oriented books and movies—challenged the statute on First Amendment grounds in Federal District Court, seeking injunctive and declaratory relief. The District Court rejected appellees' constitutional challenges. The Court of Appeals reversed, invalidating the statute in its entirety on its face on the ground that the definition of "prurient" as including "lust" was unconstitutionally overbroad in that it reached constitutionally protected material that merely stimulated normal sexual responses.

Held: The Court of Appeals erred in facially invalidating the statute in its entirety. Pp. 496–507.

(a) These cases are governed by the normal rule that partial, rather than facial, invalidation is the required course. Unless there are countervailing considerations, the Washington statute should have been invalidated only insofar as the word "lust" is to be understood as reaching protected materials. Pp. 501–504.

(b) Since prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex, *Roth* v. *United States*, 354 U. S. 476, if the Washington statute were invalidated only insofar as the word "lust" is taken to include normal interest in sex, the statute would pass constitutional muster and would validly reach a whole range of obscene publications. Moreover, if the Court of Appeals thought that "lust" refers *only* to nor-

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*Together with No. 84–143, *Eikenberry, Attorney General of Washington, et al.* v. *J–R Distributors, Inc., et al.*, also on appeal from the same court.

mal sexual appetites, it could have excised the word from the statute, since the definition also refers to "lasciviousness." Pp. 504–505.

(c) Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking it down in its entirety. The statute itself contains a severability clause, and it is evident that if the statute were invalidated insofar as it proscribes materials that appeal to normal sexual appetites, the remainder of the statute would retain its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalidation. Pp. 506–507.

725 F. 2d 482, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 507. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 510. POWELL, J., took no part in the decision of the cases.

Christine O. Gregoire, Deputy Attorney General of Washington, argued the cause for appellants in both cases. With her on the briefs were *Kenneth O. Eikenberry*, Attorney General, *pro se*, *Jeffrey C. Sullivan*, and *Richard C. Robinson*. *David A. Saraceno* filed a brief for appellant in No. 84–28.

John H. Weston argued the cause for appellees in both cases. With him on the brief were *David M. Brown*, *G. Randall Garrou*, *Jack Burns*, *James H. Lowe*, *Robert Eugene Smith*, and *Charles Stixrud*.†

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†Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Trott*, and *William C. Bryson;* for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *Anthony B. Ching*, Solicitor General, and *Linley E. Pearson*, Attorney General of Indiana; for Tom Collins, as County Attorney for the County of Maricopa, Arizona, by *Bruce A. Taylor* and *Sandor O. Shuch;* for Lawrence J. Warren, as City Attorney for the City of Renton, Washington, by *James J. Clancy*, *Lawrence J. Warren*, *pro se*, and *Daniel Kellogg;* for Citizens for Decency Through Law, Inc., et al. by *Paul C. McCommon III;* for Concerned Women for America Education and Legal Defense Foundation by *Michael P. Farris;* and for Morality in Media, Inc., by *John J. Walsh*.

JUSTICE WHITE delivered the opinion of the Court.

The question in these cases is whether the Court of Appeals for the Ninth Circuit erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials.

I

On April 1, 1982, the Washington state moral nuisance law became effective. Wash. Rev. Code §§ 7.48A.010–7.48A.900 (1983).[1] It sets forth a comprehensive scheme establishing criminal and civil penalties for those who deal in obscenity or prostitution. The statute declares to be a "moral nuisance" any place "where lewd films are publicly exhibited as a regular course of business" and any place of business "in which lewd publications constitute a principal part of the stock in trade." §§ 7.48A.020(1), (3). Subsection (2) of the "Definitions" section of the statute provides that "lewd matter" is synonymous with "obscene matter," and defines these terms to mean any matter:

> "(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and
>
> "(b) Which explicitly depicts or describes patently offensive representations or descriptions of:
>
> "(i) Ultimate sexual acts, normal or perverted, actual or simulated; or
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> "(ii) Masturbation, fellatio, cunnilingus, bestiality, excretory functions, or lewd exhibition of the genitals or genital area; or

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Briefs of *amici curiae* were filed for Mississippi Citizens for Decency Through Law by *Jacqueline Smith Pierce;* and for the American Booksellers Association, Inc., et al. by *Michael A. Bamberger.*

[1] An earlier moral nuisance law, Wash. Rev. Code § 7.48.052 *et seq.* (1983), adopted as an initiative measure in 1977, was struck down as an impermissible prior restraint. See *Spokane Arcades, Inc.* v. *Brockett,* 631 F. 2d 135 (CA9 1980), summarily aff'd, 454 U. S. 1022 (1981).

"(iii) Violent or destructive sexual acts, including but not limited to human or animal mutilation, dismemberment, rape or torture; and

"(c) Which, when considered as a whole, and in the context in which it is used, lacks serious literary, artistic, political, or scientific value." § 7.48A.010(2).

The word "prurient," as used in subsection (2)(a), is defined in subsection (8) to mean "that which incites lasciviousness or lust." § 7.48A.010(8).

On April 5, four days after the effective date of the statute, appellees—various individuals and corporations who purvey sexually oriented books and movies to the adult public[2]—challenged the constitutionality of the statute in Federal District Court, seeking injunctive and declaratory relief. One of their assertions was that the statute's definition of "prurient" to include "that which incites . . . lust" was unconstitutionally overbroad because it reached material that aroused only a normal, healthy interest in sex and that the statute was therefore to be declared invalid on its face.[3] Appellees alleged that the sexually oriented films and books they sold were protected by the First Amendment, and that the state authorities would enforce the new legislation against them unless restrained by the Court. App. 33. On April 13, the District Court for the Eastern District of Washington issued a preliminary injunction against enforcement of the statute. *Id.*, at 35.

After trial, the District Court rejected all of appellees' constitutional challenges to the validity of the statute. 544 F.

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[2] Seven separate suits were originally filed in the District Court for the Eastern District of Washington, where they were consolidated.

[3] Appellees also challenged the Washington statute's paraphrasing of the second and third parts of the test set forth in *Miller* v. *California*, 413 U. S. 15 (1973). See *infra*, at 497. The District Court rejected these attacks, and the Court of Appeals did not address them. Appellees have not renewed these claims in this Court.

Supp. 1034 (1982).[4] A divided panel of the Court of Appeals for the Ninth Circuit reversed. 725 F. 2d 482 (1984). It first held that a facial challenge to the allegedly overbroad statute was appropriate despite the fact that the law had not yet been authoritatively interpreted or enforced. This was necessary when First Amendment rights were at stake lest the very existence of the statute have a chilling effect on protected expression. The Court of Appeals acknowledged that facial invalidation required "substantial overbreadth," *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), but concluded that the requirement applies only when the challenged statute regulates conduct, as opposed to "pure speech." 725 F. 2d, at 487. Nor did the court find this to be an appropriate case for abstention. See *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941).

Reaching the merits, the Court of Appeals held that by including "lust" in its definition of "prurient," the Washington state legislature had intended the statute to reach material that merely stimulated normal sexual responses, material that it considered to be constitutionally protected. Because in its view the statute did not lend itself to a saving construction by a state court and any application of the statute would depend on a determination of obscenity by reference to the "unconstitutionally overbroad" definition, the Court of Appeals declared the statute as a whole to be null and void.[5]

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[4] The District Court stayed its judgment to allow appellees to seek a stay pending appeal from the Court of Appeals, which the Court of Appeals subsequently granted. 725 F. 2d 482, 485 (1984). Thus, the statute was not enforced pending appeal.

[5] Having struck down the statute *in toto* on overbreadth grounds, the Court of Appeals nevertheless went on to conclude that the statute's civil fine provisions were constitutionally invalid, on the theory that "the legislature will undoubtedly try again." 725 F. 2d, at 493. This part of the opinion was obviously unnecessary to the Court of Appeals' holding, and in view of our disposition of this case, will require reconsideration on remand.

The defendant state and county officials separately appealed to this Court. We noted probable jurisdiction in both cases, 469 U. S. 813 (1984).[6]

II

The Court of Appeals was of the view that neither *Roth* v. *United States*, 354 U. S. 476 (1957), nor later cases should be read to include within the definition of obscenity those materials that appeal to only normal sexual appetites. *Roth* held that the protection of the First Amendment did not extend to obscene speech, which was to be identified by inquiring "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *Id.*, at 489 (footnote omitted). Earlier in its opinion, *id.*, at 487, n. 20, the Court had defined "material which deals with sex in a manner appealing to prurient interest" as:

> "*I. e.*, material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines *prurient*, in pertinent part, as follows:
>
> "'. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . .'
>
> "*Pruriency* is defined, in pertinent part, as follows:
>
> "'. . . Quality of being prurient; lascivious desire or thought. . . .'
>
> "See also *Mutual Film Corp.* v. *Industrial Comm'n*, 236 U. S. 230, 242, where this Court said as to motion pictures: '. . . They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a *prurient interest may be excited and appealed to*. . . .' (Emphasis added.)

[6] Because there are no significant differences between the two cases, we do not distinguish between them in our discussion.

> "We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A. L. I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), *viz.*:
>
> "'. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .' See Comment, *id.*, at 10, and the discussion at page 29 *et seq.*"

Under *Roth*, obscenity was equated with prurience and was not entitled to First Amendment protection. Nine years later, however, the decision in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), established a much more demanding three-part definition of obscenity, a definition that was in turn modified in *Miller* v. *California*, 413 U. S. 15 (1973).[7] The *Miller* guidelines for identifying obscenity are:

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin*, [408 U. S.,] at 230, quoting *Roth* v. *United States*, *supra*, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24.

Miller thus retained, as had *Memoirs*, the *Roth* formulation as the first part of this test, without elaborating on or dis-

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[7] The basic difference between the *Memoirs* test and the *Miller* test was the *Memoirs* requirement that in order to be judged obscene, a work must be "utterly without redeeming social value." 383 U. S., at 418. *Miller* settled on the formulation, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." 413 U. S., at 24.

agreeing with the definition of "prurient interest" contained in the *Roth* opinion.

The Court of Appeals was aware that *Roth* had indicated in footnote 20 that material appealing to the prurient interest was "material having a tendency to excite lustful thoughts" but did not believe that *Roth* had intended to characterize as obscene material that provoked only normal, healthy sexual desires. We do not differ with that view. As already noted, material appealing to the "prurient interest" was itself the definition of obscenity announced in *Roth;* and we are quite sure that by using the words "lustful thoughts" in footnote 20, the Court was referring to sexual responses over and beyond those that would be characterized as normal. At the end of that footnote, as the Court of Appeals observed, the *Roth* opinion referred to the Model Penal Code definition of obscenity—material whose predominate appeal is to "a shameful or morbid interest in nudity, sex, or excretion" and indicated that it perceived no significant difference between that definition and the meaning of obscenity developed in the case law. This effectively negated any inference that "lustful thoughts" as used earlier in the footnote was limited to or included normal sexual responses.[8] It would require more

[8] This conclusion is bolstered by a subsequent footnote, 354 U. S., at 489, n. 26, referring to a number of cases defining obscenity in terms of "lust" or "lustful." See *Parmelee* v. *United States*, 72 App. D. C. 203, 210, 113 F. 2d 729, 736 (1940) (material is protected if "the erotic matter is not introduced to promote lust"); *United States* v. *Dennett*, 39 F. 2d 564, 569 (CA2 1930) (sex education pamphlet not obscene because tendency is to "rationalize and dignify [sex] emotions rather than to arouse lust"); *United States* v. *One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (SDNY 1933), aff'd, 72 F. 2d 705 (CA2 1934) (meaning of the word "obscene" is "[t]ending to stir the sex impulses or to lead to sexually impure and lustful thoughts"); *Commonwealth* v. *Isenstadt*, 318 Mass. 543, 549–550, 62 N. E. 2d 840, 844 (1945) (material is obscene if it has "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desire"); *Missouri* v. *Becker*, 364 Mo. 1079, 1085, 272 S. W. 2d 283, 286 (1954) (materials are obscene if they "incite lascivious thoughts, arouse lustful desire"); *Adams Theatre Co.* v. *Keenan*, 12 N. J. 267, 272, 96 A. 2d 519, 521

than the possible ambiguity in footnote 20 to lead us to believe that the Court intended to characterize as obscene and exclude from the protection of the First Amendment any and all speech that aroused any sexual responses, whether normal or morbid.

Appellants urge that because *Roth* defined prurience in terms of lust, the Washington obscenity statute cannot be faulted for defining "prurient" as that which "incites lasciviousness or lust." Whatever *Roth* meant by "lustful thoughts"—and the State agrees that the Court did not intend to include materials that provoked only normal sexual reactions—that meaning should be attributed to the term "lust" appearing in the state law. On this basis, the State submits that the statute cannot be unconstitutional for defining prurience in this manner.

The Court of Appeals rejected this view, holding that the term "lust" had acquired a far broader meaning since *Roth* was decided in 1957. The word had come to be understood as referring to a "healthy, wholesome, human reaction common to millions of well-adjusted persons in our society," rather than to any shameful or morbid desire. 725 F. 2d, at 490. Construed in this way, the statutory definition of prurience would include within the first part of the *Miller* definition of obscenity material that is constitutionally protected by the First Amendment: material that, taken as a whole, does no more than arouse, "good, old fashioned, healthy" interest in sex. *Id.*, at 492. The statute, the Court of Appeals held, was thus overbroad and invalid on its face.

Appellants fault the Court of Appeals for construing the statute in this manner. Normally, however we defer to the construction of a state statute given it by the lower federal courts. *Chardon* v. *Fumero Soto*, 462 U. S. 650, 654–655, n. 5 (1983); *Haring* v. *Prosise*, 462 U. S. 306, 314, n. 8 (1983); *Pierson* v. *Ray*, 386 U. S. 547, 558, n. 12 (1967); *General Box*

(1953) (BRENNAN, J.) (question is whether "dominant note of the presentation is erotic allurement 'tending to excite lustful and lecherous desire' ").

Co. v. *United States*, 351 U. S. 159, 165 (1956). We do so not only to "render unnecessary review of their decisions in this respect," *Cort* v. *Ash*, 422 U. S. 66, 73, n. 6 (1975), but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States. See *Bishop* v. *Wood*, 426 U. S. 341, 345–346 (1976); *Gooding* v. *Wilson*, 405 U. S. 518, 524, and n. 2 (1972). The rule is not ironclad, however, and we surely have the authority to differ with the lower federal courts as to the meaning of a state statute.[9] It may also be that, other things being equal, this would not be a case for deferring to the Court of Appeals.[10] But we pretermit this

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[9] The Court has stated that it will defer to lower courts on state-law issues unless there is "plain" error, *Palmer* v. *Hoffman*, 318 U. S. 109, 118 (1943); the view of the lower court is "clearly wrong," *The Tungus* v. *Skovgaard*, 358 U. S. 588, 596 (1959); or the construction is "clearly erroneous," *United States* v. *Durham Lumber Co.*, 363 U. S. 522, 527 (1960), or "unreasonable," *Propper* v. *Clark*, 337 U. S. 472, 486–487 (1949). On occasion, then, the Court has refused to follow the views of a lower federal court on an issue of state law. In *Cole* v. *Richardson*, 405 U. S. 676, 683–684 (1972), *e. g.*, we refused to accept a three-judge District Court's construction of a single statutory word based on the dictionary definition of that language where more reliable indicia of the legislative intent were available.

[10] Appellants make a strong argument that the Court of Appeals erred in construing the Washington statute. The Court of Appeals relied on dictionary definitions of "prurient" and "lust," saying that the most recent edition of Webster's Third New International Dictionary (Unabridged, 4th ed. 1976) did not include the word "lust" in its definition of "prurient." But neither did the edition of Webster cited by the *Roth* court. Webster's Second Edition defined "lust" as (excluding the obsolete meanings):

"sensuous desire; bodily appetite; specif. and most commonly, sexual desire, as a violent or degrading passion." Webster's New International Dictionary (Unabridged, 2d ed., 1949).

Furthermore, and of some significance, the word "lust" is defined in Webster's Third New International (Unabridged, 5th ed., 1981) in pertinent part as follows:

"1 *obs.* a: PLEASURE, GRATIFICATION, DELIGHT . . . b: personal inclination: WISH, WHIM . . . c: VIGOR, FERTILITY . . . 2: sexual de-

issue, for the Court of Appeals fell into another error when it invalidated the statute on its face because of its "unconstitutionally overbroad" definition of obscenity.

III

Appellants insist that the error was in finding any invalidity in the statute, even accepting the court's construction of the word "lust." To be obscene under *Miller*, a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value. Appellants submit that the latter two *Miller* guidelines, which the Washington statute faithfully follows, will completely cure any overbreadth that may inhere in the statute's definition of prurience as construed by the Court of Appeals. We are not at all confident that this would always be the case. It could be that a publication that on the whole arouses normal sexual responses would be declared obscene because it contains an isolated example of conduct required by the second guideline and because it also fails to have the redeeming value required by the third. Under the existing case law, material of that kind is not without constitutional protection.[11]

Facial invalidation of the statute was nevertheless improvident. We call to mind two of the cardinal rules governing the federal courts: "'[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *United States* v. *Raines*, 362 U. S. 17, 21

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sire esp. of a violent self-indulgent character: LECHERY, LASCIVIOUSNESS . . . 3 a: an intense longing: CRAVING . . . b: EAGERNESS, ENTHUSIASM."

[11] *Roth* specifically rejected a standard of obscenity that "allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." 354 U. S., at 488–489 (discussing *Queen* v. *Hicklin*, [1868] L. R. 3 Q. B. 360).

(1960), quoting *Liverpool, New York & Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885). Citing a long line of cases, *Raines* also held that "[k]indred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." These guideposts are at the bottom of the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen* v. *Louisiana*, 103 U. S. 80, 83–84 (1881), quoted with approval in *Field* v. *Clark*, 143 U. S. 649, 695–696 (1892). Absent "weighty countervailing" circumstances, *Raines*, *supra*, at 22, this is the course that the Court has adhered to. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 395–396 (1894); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210, 234–235 (1932); *Watson* v. *Buck*, 313 U. S. 387, 395–396 (1941); *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976). Just this Term, in *Tennessee* v. *Garner*, 471 U. S. 1 (1985), we held unconstitutional a state statute authorizing the use of deadly force against fleeing suspects, not on its face, but only insofar as it authorized the use of lethal force against unarmed and nondangerous suspects.

Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it. *Buckley* v. *Valeo*, *supra*, illustrates as much. So does *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), where the Court did not invalidate the state offense of "breach of the peace" on its face but only to the extent that it was construed and applied to prevent the peaceful distribution of religious literature on the streets. In *Marsh* v. *Alabama*, 326 U. S. 501 (1946), the Court struck

down a state trespass law only "[i]nsofar as the State has attempted to impose criminal punishment" on those distributing literature on the streets of a company town. *Id.*, at 509. *NAACP* v. *Button*, 371 U. S. 415 (1963), did not facially invalidate the State's rules against solicitation by attorneys but only as they were sought to be applied to the activities of the NAACP involved in that case. *Id.*, at 419, 439. More recently, in *United States* v. *Grace*, 461 U. S. 171 (1983), we declined to invalidate on its face a federal statute prohibiting demonstrations on the Supreme Court grounds and confined our holding to the invalidity of the statute as applied to picketing on the public sidewalks surrounding the building. *Id.*, at 175.

For its holding that in First Amendment cases an overbroad statute must be stricken down on its face, the Court of Appeals relied on that line of cases exemplified by *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), and more recently by *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980). In those cases, an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. If the overbreadth is "substantial," [12] the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by

[12] The Court of Appeals erred in holding that the *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), substantial overbreadth requirement is inapplicable where pure speech rather than conduct is at issue. *New York* v. *Ferber*, 458 U. S. 747, 772 (1982), specifically held to the contrary. Because of our disposition of these cases, we do not address the issue whether the overbreadth of the Washington statute, in relation to its legitimate reach, is substantial and warrants a declaration of facial invalidity. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 964–965 (1984); *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973).

legislative action or by judicial construction or partial invalidation. *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973).

It is otherwise where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish, or who seek to publish both protected and unprotected material. There is then no want of a proper party to challenge the statute, no concern that an attack on the statute will be unduly delayed or protected speech discouraged. The statute may forthwith be declared invalid to the extent that it reaches too far, but otherwise left intact.

The cases before us are ones governed by the normal rule that partial, rather than facial, invalidation is the required course. The Washington statute was faulted by the Court of Appeals only because it reached material that incited normal as well as unhealthy interest in sex, and appellees, or some of them, desiring to publish this sort of material, claimed that they faced punishment if they did so. Unless there are countervailing considerations, the Washington law should have been invalidated only insofar as the word "lust" is to be understood as reaching protected materials.

The Court of Appeals was of the view that the term "lust" did not lend itself to a limiting construction and that it would not be feasible to separate its valid and invalid applications. Even accepting the Court of Appeals' construction of "lust," however, we are unconvinced that the identified overbreadth is incurable and would taint all possible applications of the statute, as was the case in *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984). See also *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 796–799, and nn. 12–16 (1984). If, as we have held, prurience may be constitutionally defined for the purposes of identifying obscenity as that which appeals to a shameful or morbid interest in sex, *Roth* v. *United States*, 354 U. S. 476 (1957), it is equally certain that if the statute at issue here is invalidated only insofar as the word "lust" is taken to include

normal interest in sex, the statute would pass constitutional muster and would validly reach the whole range of obscene publications. Furthermore, had the Court of Appeals thought that "lust" refers *only* to normal sexual appetites, it could have excised the word from the statute entirely, since the statutory definition of prurience referred to "lasciviousness" as well as "lust." Even if the statute had not defined prurience at all, there would have been no satisfactory ground for striking the statute down in its entirety because of invalidity in all of its applications.[13]

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[13] According to appellees, the vast majority of state statutes either leave the word "prurient" undefined or adopt a definition using the words "shameful or morbid." Brief for Appellees 26–27. One State, New Hampshire, defines prurient interest as "an interest in lewdness or lascivious thoughts." N. H. Rev. Stat. Ann. §§ 650:(1)(I)–(IV)(a) (Supp. 1983). Mississippi is apparently the only State other than Washington to use the word "lust" in its definition of "prurient." Miss. Code Ann. § 97–29–103(1)(a) (Supp. 1984) ("a lustful, erotic, shameful, or morbid interest in nudity, sex or excretion"). The District Court for the Northern District of Mississippi has issued a preliminary injunction against enforcement of the statute, partly on the ground that "[t]he inclusion of the terms lustful and erotic [in the definition of prurient] would permit the application of the statute to arguably protected materials." *Goldstein* v. *Allain*, 568 F. Supp. 1377, 1385 (1983), appeal stayed pending trial on the merits, Case No. 83–4452 (CA5, June 20, 1984).

Some lower courts considering the issue have used the words "shameful or morbid" in describing the "prurient interest" that distinguishes obscene materials. See, *e. g.*, *Red Bluff Drive-In, Inc.* v. *Vance*, 648 F. 2d 1020, 1026 (CA5 1981), cert. denied *sub nom. Theatres West, Inc.* v. *Holmes*, 455 U. S. 913 (1982); *Leach* v. *American Booksellers Assn., Inc.*, 582 S. W. 2d 738, 749–750 (Tenn. 1979). Others, however, have used "lust" in connection with definitions of "prurient," reading the word as connoting a sense of shame or debasement, or relying on its use in *Roth*. See, *e. g.*, *United States* v. *35 MM. Motion Picture Film Entitled "Language of Love,"* 432 F. 2d 705, 711–712 (CA2 1970); *Childs* v. *Oregon*, 431 F. 2d 272, 275 (CA9 1970); *Flying Eagle Publications, Inc.* v. *United States*, 273 F. 2d 799, 803 (CA1 1960).

An obscenity statute that leaves the word "prurient" undefined, or rather, defined only by case law has been sustained. See *Red Bluff Drive-In, Inc.* v. *Vance*, *supra*, at 1026. See also *Ward* v. *Illinois*, 431

Partial invalidation would be improper if it were contrary to legislative intent in the sense that the legislature had passed an inseverable Act or would not have passed it had it known the challenged provision was invalid. But here the statute itself contains a severability clause;[14] and under Washington law, a statute is not to be declared unconstitutional in its entirety unless "the invalid provisons are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other, or unless the elimination of the invalid part would render the remainder of the act incapable of accomplishing the legislative purposes." *State* v. *Anderson*, 81 Wash. 2d 234, 236, 501 P. 2d 184, 185–186 (1972).[15] It would be frivolous to suggest, and

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U. S. 767, 775 (1977) (state obscenity statute not overbroad for failure to expressly describe the kinds of sexual conduct intended to be referred to under part (b) of *Miller* guidelines, where state court had construed statute to incorporate the examples of sexual conduct mentioned in *Miller*). A predecessor of the Washington statute at issue here similarly used the word "prurient" without defining it. Wash. Rev. Code § 7.48.050 *et seq.* (1983). The Court of Appeals for the Ninth Circuit struck down the statute on other grounds, but apparently the use of the word "prurient" was not challenged. See *Spokane Arcades* v. *Brockett*, 631 F. 2d, at 136, n. 1. An earlier predecessor statute used only the word "obscene," without any further definition whatsoever. The Washington Supreme Court construed the statute to incorporate the *Roth-Miller* test, saving it from unconstitutional vagueness. See *State* v. *J–R Distributors, Inc.*, 82 Wash. 2d 584, 602–603, 512 P. 2d 1049, 1061 (1973). The evident likelihood that the Washington courts would construe the instant statute to conform with the *Miller* standards also counsels against facial invalidation in this case. Cf. *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967).

[14] "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." Wash. Rev. Code § 7.48A.900 (1983).

[15] This standard is similar to that which we would apply in determining the severability of a federal statute: " 'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what

no one does, that the Washington Legislature, if it could not proscribe materials that appealed to normal as well as abnormal sexual appetites, would have refrained from passing the moral nuisance statute. And it is quite evident that the remainder of the statute retains its effectiveness as a regulation of obscenity. In these circumstances, the issue of severability is no obstacle to partial invalidation, which is the course the Court of Appeals should have pursued.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

JUSTICE POWELL took no part in the decision of these cases.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring.

Only days after the State of Washington adopted the moral nuisance law at issue here, appellees launched a constitutional attack in Federal District Court. Although the statute has never been enforced or authoritatively interpreted by a state court, appellees allege that it applies to constitutionally protected expression and is facially invalid. Because I believe that the federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law in the first instance, I think the proper disposition of these cases would be to vacate the judgment of the Court of Appeals on that ground. The Court, however, rejects that course and reaches the merits of the controversy. I join the opinion of the Court because I agree that the Court of Appeals erred in declaring the statute invalid on its face.

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is left is fully operative as a law.'" See *Buckley* v. *Valeo*, 424 U. S. 1, 108–109 (1976), quoting *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U. S. 210, 234 (1932).

Although federal courts generally have a duty to adjudicate federal questions properly before them, this Court has long recognized that concerns for comity and federalism may require federal courts to abstain from deciding federal constitutional issues that are entwined with the interpretation of state law. In *Railroad Comm'n* v. *Pullman Co.*, 312 U. S. 496 (1941), the Court held that where uncertain questions of state law must be resolved before a federal constitutional question can be decided, federal courts should abstain until a state court has addressed the state questions. *Id.*, at 501; see also *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 236–237 (1984). This doctrine of abstention acknowledges that federal courts should avoid the unnecessary resolution of federal constitutional issues and that state courts provide the authoritative adjudication of questions of state law.

Attention to the policies underlying abstention makes clear that in the circumstances of these cases, a federal court should await a definitive construction by a state court rather than precipitously indulging a facial challenge to the constitutional validity of a state statute. There can be no doubt that a state obscenity statute concerns important state interests. Such statutes implicate "the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 58 (1973). The nature of the overbreadth claim advanced by appellees suggests that abstention was required because the Washington statute is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." *Harman* v. *Forssenius*, 380 U. S. 528, 535 (1965).

The First Amendment overbreadth doctrine allows a challenge to the validity of a statute on its face only if the law is substantially overbroad. *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U. S. 789, 799–801 (1984); *New York* v. *Ferber*, 458 U. S. 747, 769–773 (1982). Thus, analysis of the constitutional claims advanced by appellees neces-

sarily requires construction of the Washington statute to assess its scope. *Id.*, at 769, n. 24; *Broadrick* v. *Oklahoma*, 413 U. S. 601, 618, n. 16 (1973) ("[A] federal court must determine what a state statute means before it can judge its facial constitutionality"). Furthermore, a narrowing construction of a statute might obviate any challenge on overbreadth grounds. *E. g.*, *id.*, at 617–618 (relying on interpretation of State Personnel Board and Attorney General to reject overbreadth claim). Where a state statute has never been construed or applied, it seems rather obvious that interpretation of the statute by a state court could substantially alter the resolution of any claim that the statute is facially invalid under the Federal Constitution.

The Court of Appeals opined that the Washington statute is not susceptible to a limiting construction and therefore any interpretation by the state court would "neither eliminate nor materially change the constitutional issues presented here." 725 F. 2d 482, 488 (1984). This assertion is simply implausible. As noted in the opinion of this Court, the conclusion below that the state statute reaches *any* expression protected by the First Amendment rests on a dubious interpretation of the word "lust" as used in the statute. *Ante*, at 500–501, n. 10. Both the text and the background of the Washington statute indicate that the state legislature sought to conform the moral nuisance law to the constitutional standards outlined by this Court in *Miller* v. *California*, 413 U. S. 15 (1973). Moreover, the state courts have demonstrated their willingness to construe state obscenity laws in accord with *Miller*. See *State* v. *J–R Distributors, Inc.*, 82 Wash. 2d 584, 512 P. 2d 1049 (1973), cert. denied, 418 U. S. 949 (1974).

Apart from its unwarranted belief that the statute is not fairly subject to a limiting construction, the Court of Appeals asserted that *Pullman* abstention should "almost never" apply where a state statute is challenged on First Amendment grounds "because the constitutional guarantee of free expression is, quite properly, always an area of particular

federal concern." 725 F. 2d, at 488. This Court has never endorsed such a proposition. See *Babbitt* v. *Farm Workers*, 442 U. S. 289, 306–312 (1979). On the contrary, even in cases involving First Amendment challenges to a state statute, absention may be required "'in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.'" *Id.*, at 306, quoting *Harman* v. *Forssenius*, *supra*, at 534; see also *Harrison* v. *NAACP*, 360 U. S. 167, 176–178 (1959).

The decision of the Court of Appeals represents a premature and avoidable interference with the enforcement of state law in an area of special concern to the States. Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when, as is the case here, the state courts stand willing to address questions of state law on certification from a federal court. Wash. Rev. Code §§ 2.60.010–2.60.900 (1983); Wash. Rule App. Proc. 16.16. Cf. *Bellotti* v. *Baird*, 428 U. S. 132, 150–151 (1976). In my view, the state courts should have been afforded an opportunity to construe the Washington moral nuisance law in the first instance.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

We granted certiorari to consider the holding of the United States Court of Appeals for the Ninth Circuit that the Washington state obscenity law, Wash. Rev. Code §§ 7.48A.010–7.48A.900 (1983), is substantially overbroad and therefore invalid on its face under the First Amendment because it defines "prurient" in such a way as to reach constitutionally protected material that stimulates no more than a healthy interest in sex. This statute is, in my view, unconstitutionally overbroad and therefore invalid on its face for the reasons given in my dissent in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973). I would therefore affirm the judgment of the Court of Appeals.

MITCHELL *v.* FORSYTH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84–335. Argued February 27, 1985—Decided June 19, 1985

In 1970, petitioner, who was then the Attorney General, authorized a warrantless wiretap for the purpose of gathering intelligence regarding the activities of a radical group that had made tentative plans to take actions threatening the Nation's security. During the time the wiretap was installed, the Government intercepted three conversations between a member of the group and respondent. Thereafter, this Court in *United States* v. *United States District Court*, 407 U. S. 297 *(Keith)*, ruled that the Fourth Amendment does not permit warrantless wiretaps in cases involving domestic threats to the national security. Respondent then filed a damages action in Federal District Court against petitioner and others, alleging that the surveillance to which he had been subjected violated the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act. Ultimately, the District Court, granting respondent's motion for summary judgment on the issue of liability, held that petitioner was not entitled to either absolute or qualified immunity. The Court of Appeals agreed with the denial of absolute immunity, but held, with respect to the denial of qualified immunity, that the District Court's order was not appealable under the collateral order doctrine.

Held:

1. Petitioner is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions. His status as a Cabinet officer is not in itself sufficient to invest him with absolute immunity. The considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President do not demand a similar immunity for Cabinet officers or other high executive officials. Nor does the nature of the Attorney General's national security functions—as opposed to his prosecutorial functions—warrant absolute immunity. Petitioner points to no historical or common-law basis for absolute immunity for officers carrying out tasks essential to national security, such as pertains to absolute immunity for judges, prosecutors, and witnesses. The performance of national security functions does not subject an official to the same risks of entanglement in vexatious litigation as does the carrying out of the judicial or "quasi-judicial" tasks that have been the primary wellsprings of absolute immunities. And the danger that high federal officials will disregard constitutional rights in their zeal to protect the

national security is sufficiently real to counsel against affording such officials an absolute immunity. Pp. 520–524.

2. The District Court's denial of qualified immunity, to the extent it turned on a question of law, is an appealable "final decision" within the meaning of 28 U. S. C. § 1291 notwithstanding the absence of a final judgment. Qualified immunity, similar to absolute immunity, is an entitlement not to stand trial under certain circumstances. Such entitlement is an *immunity from suit* rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of the denial of absolute immunity indicates that the denial of qualified immunity should be similarly appealable under the "collateral order" doctrine; in each case, the district court's decision is effectively unreviewable on appeal from a final judgment. The denial of qualified immunity also meets the additional criteria for an appealable interlocutory order: it conclusively determines the disputed question, and it involves a claim of rights separable from, and collateral to, rights asserted in the action. Pp. 524–530.

3. Petitioner is entitled to qualified immunity from suit for his authorization of the wiretap in question notwithstanding his actions violated the Fourth Amendment. Under *Harlow* v. *Fitzgerald*, 457 U. S. 800, petitioner is immune unless his actions violated clearly established law. In 1970, when the wiretap took place, well over a year before *Keith*, *supra*, was decided, it was not clearly established that such a wiretap was unconstitutional. Pp. 530–535.

729 F. 2d 267, affirmed in part and reversed in part.

WHITE, J., delivered the opinion of the Court, in which BLACKMUN, J., joined; in Parts I, III, and IV of which BURGER, C. J., and O'CONNOR, J., joined; and in Parts I and II of which BRENNAN and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in part, *post*, p. 536. O'CONNOR, J., filed an opinion concurring in part, in which BURGER, C. J., joined, *post*, p. 537. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 538. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 543. POWELL, J., took no part in the decision of the case. REHNQUIST, J., took no part in the consideration or decision of the case.

Deputy Solicitor General Bator argued the cause for petitioner. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Samuel A. Alito, Jr.*, *Barbara L. Herwig*, *Gorden W. Daiger*, and *Larry L. Gregg*.

David Rudovsky argued the cause for respondent. With him on the brief was *Michael Avery*.

JUSTICE WHITE delivered the opinion of the Court.

This is a suit for damages stemming from a warrantless wiretap authorized by petitioner, a former Attorney General of the United States. The case presents three issues: whether the Attorney General is absolutely immune from suit for actions undertaken in the interest of national security; if not, whether the District Court's finding that petitioner is not immune from suit for his actions under the qualified immunity standard of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), is appealable; and, if so, whether the District Court's ruling on qualified immunity was correct.

I

In 1970, the Federal Bureau of Investigation learned that members of an antiwar group known as the East Coast Conspiracy to Save Lives (ECCSL) had made plans to blow up heating tunnels linking federal office buildings in Washington, D. C., and had also discussed the possibility of kidnaping then National Security Adviser Henry Kissinger. On November 6, 1970, acting on the basis of this information, the then Attorney General John Mitchell authorized a warrantless wiretap on the telephone of William Davidon, a Haverford College physics professor who was a member of the group. According to the Attorney General, the purpose of the wiretap was the gathering of intelligence in the interest of national security.

The FBI installed the tap in late November 1970, and it stayed in place until January 6, 1971. During that time, the Government intercepted three conversations between Davidon and respondent Keith Forsyth. The record before us does not suggest that the intercepted conversations, which appear to be innocuous, were ever used against Forsyth in any way. Forsyth learned of the wiretap in 1972, when, as a criminal defendant facing unrelated charges, he moved under

18 U. S. C. § 3504 for disclosure by the Government of any electronic surveillance to which he had been subjected. The Government's response to Forsyth's motion revealed that although he had never been the actual target of electronic surveillance, he "did participate in conversations that are unrelated to this case and which were overheard by the Federal Government during the course of electronic surveillance expressly authorized by the President acting through the Attorney General." App. 20–21. The Government's response was accompanied by an affidavit, sworn to by then Attorney General Richard Kleindienst, averring that the surveillance to which Forsyth had been subjected was authorized "in the exercise of [the President's] authority relating to the national security as set forth in 18 U. S. C. 2511(3)." *Id.*, at 23.[1]

Shortly thereafter, this Court ruled that the Fourth Amendment does not permit the use of warrantless wiretaps

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[1] Title 18 U. S. C. § 2511(3) (1976 ed.) provided:

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power" (footnote omitted).

The provision, enacted as part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, was repealed in 1978 by § 201(c) of the Foreign Intelligence Surveillance Act, Pub. L. 95–511, 92 Stat. 1797.

in cases involving domestic threats to the national security. *United States* v. *United States District Court*, 407 U. S. 297 (1972) *(Keith)*. In the wake of the *Keith* decision, Forsyth filed this lawsuit against John Mitchell and several other defendants in the United States District Court for the Eastern District of Pennsylvania. Forsyth alleged that the surveillance to which he had been subjected violated both the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §§ 2510–2520, which sets forth comprehensive standards governing the use of wiretaps and electronic surveillance by both governmental and private agents. He asserted that both the constitutional and statutory provisions provided him with a private right of action; he sought compensatory, statutory, and punitive damages.

Discovery and related preliminary proceedings dragged on for the next five-and-a-half years. By early 1978, both Forsyth and Mitchell had submitted motions for summary judgment on which the District Court was prepared to rule. Forsyth contended that the uncontested facts established that the wiretap was illegal and that Mitchell and the other defendants were not immune from liability; Mitchell contended that the decision in *Keith* should not be applied retroactively to the wiretap authorized in 1970 and that he was entitled either to absolute prosecutorial immunity from suit under the rule of *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), or to qualified or "good faith" immunity under the doctrine of *Wood* v. *Strickland*, 420 U. S. 308 (1975).

The court found that there was no genuine dispute as to the facts that the FBI had informed Mitchell of the ECCSL's plots, that Mitchell had authorized the warrantless tap on Davidon's phone, and that the ostensible purpose of the tap was the gathering of intelligence in the interest of national security. Such a wiretap, the court concluded, was a clear violation of the Fourth Amendment under *Keith*, which, in

the court's view, was to be given retroactive effect. The court also rejected Mitchell's claim to absolute immunity from suit under *Imbler* v. *Pachtman: Imbler*, the court held, provided absolute immunity to a prosecutor only for his acts in "initiating and pursuing a criminal prosecution"; Mitchell's authorization of the wiretap constituted the performance of an investigative rather than prosecutorial function. *Forsyth* v. *Kleindienst*, 447 F. Supp. 192, 201 (1978). Although rejecting Mitchell's claim of absolute immunity, the court found that Mitchell was entitled to assert a qualified immunity from suit and could prevail if he proved that he acted in good faith. Applying this standard, with its focus on Mitchell's state of mind at the time he authorized the wiretap, the court concluded that neither side had met its burden of establishing that there was no genuine issue of material fact as to Mitchell's good faith. Accordingly, the court denied both parties' motions for summary judgment. *Id.*, at 203.

Mitchell appealed the District Court's denial of absolute immunity to the United States Court of Appeals for the Third Circuit, which remanded for further factfinding on the question whether the wiretap authorization was "necessary to [a] . . . decision to initiate a criminal prosecution" and thus within the scope of the absolute immunity recognized in *Imbler* v. *Pachtman*. *Forsyth* v. *Kleindienst*, 599 F. 2d 1203, 1217 (1979). On remand, the District Court held a hearing on the question whether the wiretap served a prosecutorial purpose. On the basis of the hearing and the evidence in the record, the court concluded that Mitchell's authorization of the wiretap was not intended to facilitate any prosecutorial decision or further a criminal investigation. Mitchell himself had disavowed any such intention and insisted that the only reason for the wiretap was to gather intelligence needed for national security purposes. Taking Mitchell at his word in this regard, the court held to its conclusion that he was not entitled to absolute prosecutorial immunity.

At the same time, the court reconsidered its ruling on qualified immunity in light of *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), in which this Court purged qualified immunity doctrine of its subjective components and held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*, at 818. The District Court rejected Mitchell's argument that under this standard he should be held immune from suit for warrantless national security wiretaps authorized before this Court's decision in *Keith:* that decision was merely a logical extension of general Fourth Amendment principles and in particular of the ruling in *Katz* v. *United States*, 389 U. S. 347 (1967), in which the Court held for the first time that electronic surveillance unaccompanied by physical trespass constituted a search subject to the Fourth Amendment's warrant requirement. Mitchell and the Justice Department, the court suggested, had chosen to "gamble" on the possibility that this Court would create an exception to the warrant requirement if presented with a case involving national security. Having lost the gamble, Mitchell was not entitled to complain of the consequences.[2] The court therefore denied Mitchell's motion for summary judgment, granted Forsyth's motion for summary judgment on the issue of liability, and scheduled further proceedings on the issue of damages. *Forsyth* v. *Kleindienst*, 551 F. Supp. 1247 (1982).

Mitchell again appealed, contending that the District Court had erred in its rulings on both absolute immunity and qualified immunity. Holding that it possessed jurisdiction to decide the denial of absolute immunity issue despite the fact

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[2] The court also suggested that Mitchell should have been put on notice that his act was unlawful by Title III, which, in its view, clearly proscribed such warrantless wiretaps.

that it was a pretrial order and arguably not a final judgment,[3] the Court of Appeals rejected Mitchell's argument that the national security functions of the Attorney General entitled him to absolute immunity under *Imbler* v. *Pachtman* or otherwise. With respect to the denial of qualified immunity, the Court of Appeals held that the District Court's order was not appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). Fearing that allowing piecemeal appeals of such issues would unduly burden appellate courts, the court was unwilling to hold that the goal of protecting officials against frivolous litigation required that orders denying qualified immunity be immediately appealable. Forsyth's claim, the court noted, was not a frivolous one, and the policies underlying the immunity doctrine would therefore not be frustrated if Mitchell were forced to wait until final judgment to appeal the qualified immunity ruling.[4] *Forsyth* v. *Kleindienst*, 729

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[3] Forsyth had moved for dismissal of the appeal on the ground that it was interlocutory and therefore not within the Court of Appeals' jurisdiction under 28 U. S. C. § 1291. A motions panel of the Third Circuit held that the denial of absolute immunity was an appealable order under *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), and that the issue of the appealability of a denial of qualified immunity was debatable enough to justify referring it to the merits panel. *Forsyth* v. *Kleindienst*, 700 F. 2d 104 (1983). Judge Sloviter dissented, arguing that Mitchell's arguments regarding absolute immunity were frivolous in light of the Third Circuit's earlier consideration of the same issue. In addition, Judge Sloviter argued that a denial of qualified immunity—unlike a denial of absolute immunity—was not immediately appealable under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), because the issue of objective good faith was neither separate from the merits of the underlying action nor effectively unreviewable on appeal from a final judgment.

[4] Judge Weis, dissenting, argued that the point of the immunity doctrine was protecting officials not only from ultimate liability but also from the trial itself, and that the vindication of this goal required immediate appeal. On the merits, Judge Weis would have reversed the District Court's immunity ruling on the ground that until *Keith* was decided it was not clearly

F. 2d 267 (1984). The court therefore remanded the case to the District Court for further proceedings leading to the entry of final judgment, and Mitchell filed a timely petition for certiorari seeking review of the court's rulings on both absolute and qualified immunity.

The question whether the Attorney General is absolutely immune from suit for acts performed in the exercise of his national security functions is an important one that we have hitherto left unanswered. See *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd by an equally divided Court, 452 U. S. 713 (1981). Moreover, the issue of the appealability before final judgment of orders denying immunity under the objective standard of *Harlow* v. *Fitzgerald* is one that has divided the Courts of Appeals.[5] Finally, the District Court's decision—left standing by the Court of Appeals—that Mitchell's actions violated clearly established law is contrary to the rulings of the District of Columbia Circuit in *Sinclair* v. *Kleindienst*, 207 U. S. App. D. C. 155, 645 F. 2d 1080 (1981), and *Zweibon* v. *Mitchell*, 231 U. S. App. D. C. 398, 720 F. 2d 162 (1983), cert. denied,

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established that the warrantless wiretapping in which Mitchell had engaged was illegal.

[5] The First, Eighth, and District of Columbia Circuits have held such orders appealable, see *Krohn* v. *United States*, 742 F. 2d 24 (CA1 1984); *Evans* v. *Dillahunty*, 711 F. 2d 828 (CA8 1983); *McSurely* v. *McClellan*, 225 U. S. App. D. C. 67, 697 F. 2d 309 (1982), while the Fifth and Seventh Circuits have joined the Third Circuit in holding that the courts of appeals lack jurisdiction over interlocutory appeals of qualified immunity rulings, see *Kenyatta* v. *Moore*, 744 F. 2d 1179 (CA5 1984); *Lightner* v. *Jones*, 752 F. 2d 1251 (CA7 1985). The Fourth Circuit has held that a district court's denial of qualified immunity is not appealable when the plaintiff's action involves claims for injunctive relief that will have to be adjudicated regardless of the resolution of any damages claims. *England* v. *Rockefeller*, 739 F. 2d 140 (1984); *Bever* v. *Gilbertson*, 724 F. 2d 1083, cert. denied, 469 U. S. 948 (1984). Because this case does not involve a claim for injunctive relief, the propriety of the Fourth Circuit's approach is not before us, and we express no opinion on the question.

469 U. S. 880 (1984). We granted certiorari to address these issues, 469 U. S. 929 (1984).

II

We first address Mitchell's claim that the Attorney General's actions in furtherance of the national security should be shielded from scrutiny in civil damages actions by an absolute immunity similar to that afforded the President, see *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), judges, prosecutors, witnesses, and officials performing "quasi-judicial" functions, see *Briscoe* v. *LaHue*, 460 U. S. 325 (1983); *Butz* v. *Economou*, 438 U. S. 478, 508–517 (1978); *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976), and legislators, see *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951). We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.

As the Nation's chief law enforcement officer, the Attorney General provides vital assistance to the President in the performance of the latter's constitutional duty to "preserve, protect, and defend the Constitution of the United States." U. S. Const., Art. II, § 1, cl. 8. Mitchell's argument, in essence, is that the national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation's well-being, that we cannot tolerate any risk that in performing those functions he will be chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens. Such arguments, "when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration." *Keith*, 407 U. S., at 319. Nonetheless, we do not believe that the considerations that have led us to recognize absolute immunities for other officials dictate the same result in this case.

Our decisions in this area leave no doubt that the Attorney General's status as a Cabinet officer is not in itself sufficient to invest him with absolute immunity: the considerations of separation of powers that call for absolute immunity for state and federal legislators and for the President of the United States do not demand a similar immunity for Cabinet officers or other high executive officials. See *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982); *Butz* v. *Economou*, *supra*. Mitchell's claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. See *Harlow* v. *Fitzgerald*, *supra*, at 810–811. Because Mitchell was not acting in a prosecutorial capacity in this case, the situations in which we have applied a functional approach to absolute immunity questions provide scant support for blanket immunization of his performance of the "national security function."

First, in deciding whether officials performing a particular function are entitled to absolute immunity, we have generally looked for a historical or common-law basis for the immunity in question. The legislative immunity recognized in *Tenney* v. *Brandhove*, *supra*, for example, was rooted in the long struggle in both England and America for legislative independence, a presupposition of our scheme of representative government. The immunities for judges, prosecutors, and witnesses established by our cases have firm roots in the common law. See *Briscoe* v. *LaHue*, *supra*, at 330–336. Mitchell points to no analogous historical or common-law basis for an absolute immunity for officers carrying out tasks essential to national security.

Second, the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or "quasi-judicial" tasks that have been the primary wellsprings of absolute immunities. The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable

that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict. See *Bradley* v. *Fisher*, 13 Wall. 335, 348 (1872). National security tasks, by contrast, are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation.[6] Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect on the Attorney General's performance of his national security tasks.

Third, most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. Legislators are accountable to their constituents, see *Tenney* v. *Brandhove*, *supra*, at 378, and the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need

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[6] We recognize that Mitchell himself has faced a significant number of lawsuits stemming from his authorization of warrantless national security wiretaps. See *Zweibon* v. *Mitchell*, 231 U. S. App. D. C. 398, 720 F. 2d 162 (1983), cert. denied, 469 U. S. 880 (1984); *Sinclair* v. *Kleindienst*, 207 U. S. App. D. C. 155, 645 F. 2d 1080 (1981); *Smith* v. *Nixon*, 196 U. S. App. D. C. 276, 606 F. 2d 1183 (1979); *Halperin* v. *Kissinger*, 196 U. S. App. D. C. 285, 606 F. 2d 1192 (1979), aff'd by an equally divided Court, 452 U. S. 713 (1981); *Weinberg* v. *Mitchell*, 588 F. 2d 275 (CA9 1978); *Burkhart* v. *Saxbe*, 596 F. Supp. 96 (ED Pa. 1984); *McAlister* v. *Kleindienst*, Civ. Action No. 72–1977 (filed Oct. 10, 1972, ED Pa.). This spate of litigation does not, however, seriously undermine our belief that the Attorney General's national security duties will not tend to subject him to large numbers of frivolous lawsuits. All of these cases involved warrantless wiretapping authorized by the Attorney General and were generated by our decision in *Keith*. They do not suggest that absolute immunity rather than qualified immunity is necessary for the proper performance of the Attorney General's role in protecting national security.

for damages actions to prevent unjust results. Similar built-in restraints on the Attorney General's activities in the name of national security, however, do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary. As the Court observed in *Keith*, the label of "national security" may cover a multitude of sins:

> "National security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . History abundantly documents the tendency of Government—however, benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. . . . The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." 407 U. S., at 313–314.

The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.[7]

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[7] It is true that damages actions are not the only conceivable deterrents to constitutional violations by the Attorney General. Mitchell suggests, for example, the possibility of declaratory or injunctive relief and the use of the exclusionary rule to prevent the admission of illegally seized evidence in criminal proceedings. However, as Justice Harlan pointed out in his concurring opinion in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 398–411 (1971), such remedies are useless where a citizen not accused of any crime has been subjected to a completed constitutional vi-

We emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints. Under the standard of qualified immunity articulated in *Harlow* v. *Fitzgerald*, the Attorney General will be entitled to immunity so long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U. S., at 818. This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard: "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate . . . ." *Id.*, at 819 (emphasis added). This is as true in matters of national security as in other fields of governmental action. We do not believe that the security of the Republic will be threatened if its Attorney General is given incentives to abide by clearly established law.

III

Although 28 U. S. C. § 1291 vests the courts of appeals with jurisdiction over appeals only from "final decisions" of the district courts, "a decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp.*, 379 U. S. 148, 152 (1964). Thus, a decision of a district court is appealable if it falls within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that

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olation: in such cases, "it is damages or nothing." *Id.*, at 410. Other possibilities mentioned by Mitchell—including criminal prosecution and impeachment of the Attorney General—would be of dubious value for deterring all but the most flagrant constitutional violations.

appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S., at 546.

A major characteristic of the denial or granting of a claim appealable under *Cohen*'s "collateral order" doctrine is that "unless it can be reviewed before [the proceedings terminate], it never can be reviewed at all." *Stack* v. *Boyle*, 342 U. S. 1, 12 (1952) (opinion of Jackson, J.); see also *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 266 (1982). When a district court has denied a defendant's claim of right not to stand trial, on double jeopardy grounds, for example, we have consistently held the court's decision appealable, for such a right cannot be effectively vindicated after the trial has occurred. *Abney* v. *United States*, 431 U. S. 651 (1977).[8] Thus, the denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action. See *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982); cf. *Helstoski* v. *Meanor*, 442 U. S. 500 (1979).

At the heart of the issue before us is the question whether qualified immunity shares this essential attribute of absolute immunity—whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances. The conception animating the qualified immunity doctrine as set forth in *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), is that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.*, at 819, quoting *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967). As the citation to

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[8] Similarly, we have held that state-court decisions rejecting a party's federal-law claim that he is not subject to suit before a particular tribunal are "final" for purposes of our certiorari jurisdiction under 28 U. S. C. § 1257. *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963); *Construction Laborers* v. *Curry*, 371 U. S. 542 (1963).

Pierson v. *Ray* makes clear, the "consequences" with which we were concerned in *Harlow* are not limited to liability for money damages; they also include "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow*, 457 U. S., at 816. Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as "[i]nquiries of this kind can be peculiarly disruptive of effective government." *Id.*, at 817.

With these concerns in mind, the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are alleged to have violated were not clearly established at the time. *Id.*, at 817–818. Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. See *id.*, at 818. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of an order denying absolute immunity indicates

to us that the denial of qualified immunity should be similarly appealable: in each case, the district court's decision is effectively unreviewable on appeal from a final judgment.

An appealable interlocutory decision must satisfy two additional criteria: it must "conclusively determine the disputed question," *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978), and that question must involve a "clai[m] of right separable from, and collateral to, rights asserted in the action," *Cohen*, *supra*, at 546. The denial of a defendant's motion for dismissal or summary judgment on the ground of qualified immunity easily meets these requirements. Such a decision is "conclusive" in either of two respects. In some cases, it may represent the trial court's conclusion that even if the facts are as asserted by the defendant, the defendant's actions violated clearly established law and are therefore not within the scope of the qualified immunity. In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune. Alternatively, the trial judge may rule only that if the facts are as asserted by the plaintiff, the defendant is not immune. At trial, the plaintiff may not succeed in proving his version of the facts, and the defendant may thus escape liability. Even so, the court's denial of summary judgment finally and conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations, and because "[t]here are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred," it is apparent that "*Cohen*'s threshold requirement of a fully consummated decision is satisfied" in such a case. *Abney* v. *United States*, 431 U. S., at 659.

Similarly, it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim

that his rights have been violated. See *id.*, at 659–660. An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.[9] To be sure, the resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief; the same is true, however, when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause. In the case of a double jeopardy claim, the court must compare the facts alleged in the second indictment with those in the first to determine whether the prosecutions are for the same offense, while in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct. In holding these and similar issues of absolute immunity to be appealable under the collateral order doctrine, see *Abney* v. *United States*, *supra*; *Helstoski* v. *Meanor*, 442 U. S. 500 (1979); *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982), the Court has recognized that a question of immunity is separate from the merits of the underlying action for purposes of

[9] We emphasize at this point that the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law.

the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue.[10]

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[10] In advancing its view of the "separate from the merits" aspect of the *Cohen* test, JUSTICE BRENNAN's dissent fails to account for our rulings on appealability of denials of claims of double jeopardy and absolute immunity. If, as the dissent seems to suggest, any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of immediate appealability, none of these matters could be appealed, for all of them require an inquiry into whether the plaintiff's (or, in the double jeopardy situation, the Government's) factual allegations state a claim that falls outside the scope of the defendant's immunity. There is no distinction in principle between the inquiry in such cases and the inquiry where the issue is qualified immunity. Moreover, the dissent's characterization of the double jeopardy and absolute immunity cases as involving issues that are not "necessarily . . . conclusive or even relevant to the question whether the defendant is ultimately liable on the merits," *post*, at 547, is of course inaccurate: meritorious double jeopardy and absolute immunity claims are necessarily directly controlling of the question whether the defendant will ultimately be liable. Indeed, if our holdings on the appealability of double jeopardy and absolute immunity rulings make anything clear it is that the fact that an issue is outcome determinative does not mean that it is not "collateral" for purposes of the *Cohen* test. The dissent's explanation that the absolute immunity and double jeopardy cases do not involve a determination of the defendant's liability *"on the merits"* similarly fails to distinguish those cases from this one. The reason is that the legal determination that a given proposition of law was not clearly established at the time the defendant committed the alleged acts does not entail a determination of the "merits" of the plaintiff's claim that the defendant's actions were in fact unlawful.

Nor do we see any inconsistency between our ruling here and the handling of the "completely separate from the merits" requirement in *Richardson-Merrell Inc.* v. *Koller*, *ante*, p. 424. Contrary to JUSTICE BRENNAN's suggestion, the *Richardson-Merrell* Court's alternative holding that the issue of disqualification of counsel in a civil case is not separate from the merits is not based only on the fact that the issue involves some factual overlap with the merits of the underlying litigation. Rather, the Court in *Richardson-Merrell* observes that the question whether a district court's disqualification order should be reversed may depend on the effect of disqualification (or nondisqualification) on the success of the parties in litigating the other legal and factual issues that form their underlying

Accordingly, we hold that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U. S. C. § 1291 notwithstanding the absence of a final judgment.

IV

The Court of Appeals thus had jurisdiction over Mitchell's claim of qualified immunity, and that question was one of the questions presented in the petition for certiorari which we granted without limitation. Moreover, the purely legal question on which Mitchell's claim of immunity turns is "appropriate for our immediate resolution" notwithstanding that it was not addressed by the Court of Appeals. *Nixon* v. *Fitzgerald*, *supra*, at 743, n. 23. We therefore turn our attention to the merits of Mitchell's claim of immunity.

Under *Harlow* v. *Fitzgerald*, Mitchell is immune unless his actions violated clearly established law. See 457 U. S., at 818–819; see also *Davis* v. *Scherer*, 468 U. S. 183, 197 (1984). Forsyth complains that in November 1970, Mitchell authorized a warrantless wiretap aimed at gathering intelligence regarding a domestic threat to national security—the kind of wiretap that the Court subsequently declared to be illegal. *Keith*, 407 U. S. 297 (1972). The question of Mitchell's immunity turns on whether it was clearly established in November 1970, well over a year before *Keith* was decided, that such wiretaps were unconstitutional. We conclude that it was not.

The use of warrantless electronic surveillance to gather intelligence in cases involving threats to the Nation's security can be traced back to 1940, when President Roosevelt instructed Attorney General Robert Jackson that he was authorized to approve wiretaps of persons suspected of sub-

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dispute. Accordingly, the propriety of a disqualification order—unlike a qualified immunity ruling—is not a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.

versive activities. In 1946, President Truman's approval of Attorney General Tom Clark's request for expanded wiretapping authority made it clear that the Executive Branch perceived its authority to extend to cases involving "domestic security." See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 36 (1976). Attorneys General serving Presidents Eisenhower, Kennedy, Johnson, and Nixon continued the practice of employing warrantless electronic surveillance in their efforts to combat perceived threats to the national security, both foreign and domestic. See *Keith*, *supra*, at 310–311, n. 10.

Until 1967, it was anything but clear that these practices violated the Constitution: the Court had ruled in *Olmstead* v. *United States*, 277 U. S. 438 (1928), that a wiretap not involving a physical trespass on the property of the person under surveillance was not a search for purposes of the Fourth Amendment, and although the rule in *Olmstead* had suffered some erosion, see *Silverman* v. *United States*, 365 U. S. 505 (1961), the Court had never explicitly disavowed it. Not until 1967 did the Court hold that electronic surveillance unaccompanied by any physical trespass constituted a search subject to the Fourth Amendment's restrictions, including the Warrant Clause. *Katz* v. *United States*, 389 U. S. 347. Yet the *Katz* Court recognized that warrantless searches do not in all circumstances violate the Fourth Amendment; and though the Court held that no recognized exception to the warrant requirement could justify warrantless wiretapping in an ordinary criminal case, the Court was careful to note that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." *Id.*, at 358, n. 23. In separate concurrences, Members of the Court debated the question whether the President or the Attorney General could constitutionally authorize warrantless wiretapping in the interest of national security. Compare *id.*, at 359–360 (Douglas, J., joined by

BRENNAN, J., concurring), with *id.*, at 362–364 (WHITE, J., concurring).

In the aftermath of *Katz*, Executive authority to order warrantless national security wiretaps remained uncertain. This uncertainty found expression in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, in which Congress attempted to fashion rules governing wiretapping and electronic surveillance that would "meet the constitutional requirements for electronic surveillance enunciated by this Court in *Berger* v. *New York*, 388 U. S. 41 (1967), and *Katz* v. *United States*, 389 U. S. 347 (1967)." *Keith*, *supra*, at 302. Although setting detailed standards governing wiretapping by both state and federal law enforcement agencies, the Act disclaimed any intention "to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." 18 U. S. C. § 2511(3) (1976 ed.). As subsequently interpreted by this Court in *Keith*, this provision of the Act was an "expression of neutrality," 407 U. S., at 308, reflecting both an awareness on the part of Congress of the uncertain scope of Executive authority to conduct warrantless national security wiretaps and an unwillingness to circumscribe whatever such authority might exist.[11]

[11] The District Court's suggestion that Mitchell's actions violated clearly established law because they were in conflict with Title III, see n. 2, *supra*, is therefore expressly contradicted by *Keith*, in which the Court held that Title III "simply did not legislate with respect to national security surveillances." 407 U. S., at 306. Given Congress' express disclaimer of any intention to limit the President's national security wiretapping powers, it cannot be said that Mitchell's actions were unlawful under Title III, let alone that they were clearly unlawful. *Keith* similarly requires rejection of Forsyth's submission that the legality of the wiretap under Title III is open on remand because it has never been shown that the tap was justified by a "clear and present danger" to the national security. See 18 U. S. C. § 2511(3) (1976 ed.). The *Keith* majority's handling of the statutory

Uncertainty regarding the legitimacy of warrantless national security wiretapping during the period between *Katz* and *Keith* is also reflected in the decisions of the lower federal courts. In a widely cited decision handed down in July 1969, the United States District Court for the Southern District of Texas held that the President, acting through the Attorney General, could legally authorize warrantless wiretaps to gather foreign intelligence in the interest of national security. *United States* v. *Clay*, CR. No. 67–H–94 (SD Tex., July 14, 1969), aff'd, 430 F. 2d 165, 171 (CA5 1970), rev'd on other grounds, 403 U. S. 698 (1971). *Clay*, of course, did not speak to the legality of surveillance directed against domestic threats to the national security, but it was soon applied by two Federal District Courts to uphold the constitutionality of warrantless wiretapping directed against the Black Panthers, a domestic group believed by the Attorney General to constitute a threat to the national security. *United States* v. *Dellinger*, No. 69 CR 180 (ND Ill., Feb. 20, 1970) (App. 30), rev'd, 472 F. 2d 340 (CA7 1972); *United States* v. *O'Neal*, No. KC–CR–1204 (Kan., Sept. 1, 1970) (App. 38), appeal dism'd, 453 F. 2d 344 (CA10 1972).

So matters stood when Mitchell authorized the Davidon wiretap at issue in this case. Only days after the termination of the Davidon wiretap, however, two District Courts explicitly rejected the Justice Department's contention that the Attorney General had the authority to order warrantless wiretaps in domestic national security cases. *United States* v. *Smith*, 321 F. Supp. 424 (CD Cal., Jan. 8, 1971); *United States* v. *Sinclair*, 321 F. Supp. 1074 (ED Mich., Jan. 26, 1971). The Sixth Circuit affirmed the *Sinclair* decision in *United States* v. *United States District Court for Eastern Dist. of Mich.*, 444 F. 2d 651 (1971), and our own affirmance followed in 1972. *Keith, supra.*

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question makes clear that the statutory exemption for national security wiretaps did not depend on a showing of an actual clear and present danger.

In short, the doctrine of Executive authority to conduct warrantless domestic security wiretaps did not long survive the expiration of the Davidon wiretap. It by no means follows, however, that Mitchell's actions in authorizing the wiretap violated law that was clearly established at the time of the authorization. As of 1970, the Justice Departments of six successive administrations had considered warrantless domestic security wiretaps constitutional. Only three years earlier, this Court had expressly left open the possibility that this view was correct. Two Federal District Courts had accepted the Justice Department's position, and although the Sixth Circuit later firmly rejected the notion that the Fourth Amendment countenanced warrantless domestic security wiretapping, this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction. In framing the issue before it, the *Keith* Court explicitly recognized that the question was one that had yet to receive the definitive answer that it demanded:

> "The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." 407 U. S., at 299.

Of course, *Keith* finally laid to rest the notion that warrantless wiretapping is permissible in cases involving domestic threats to the national security. But whatever the agree-

ment with the Court's decision and reasoning in *Keith* may be, to say that the principle *Keith* affirmed had already been "clearly established" is to give that phrase a meaning that it cannot easily bear.[12] The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected. The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted. Hence, in the absence of contrary directions from Congress, Mitchell is immune from suit for his authorization of the Davidon wiretap notwithstanding that his actions violated the Fourth Amendment.[13]

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[12] We do not intend to suggest that an official is always immune from liability or suit for a warrantless search merely because the warrant requirement has never explicitly been held to apply to a search conducted in identical circumstances. But in cases where there is a legitimate question whether an exception to the warrant requirement exists, it cannot be said that a warrantless search violates clearly established law.

[13] Forsyth insists that even if the District Court was incorrect in concluding that warrantless national security wiretaps conducted in 1970–1971 violated clearly established law, Mitchell is not entitled to summary judgment because it has never been found that his actions were in fact motivated by a concern for national security. This submission is untenable. The District Court held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, not a prosecutorial function for which absolute immunity was recognized. The court then concluded that the tap violated the Fourth Amendment and that Mitchell was not immune from liability for this violation under the *Harlow* standard. Had the court not concluded that the wiretap was indeed a national security wiretap, the qualified immunity question would never have been reached, for the tap would clearly have been illegal under Title III, and qualified immunity hence unavailable. In this light, the District

V

We affirm the Court of Appeals' denial of Mitchell's claim to absolute immunity. The court erred, however, in declining to accept jurisdiction over the question of qualified immunity; and to the extent that the effect of the judgment of the Court of Appeals is to leave standing the District Court's erroneous decision that Mitchell is not entitled to summary judgment on the ground of qualified immunity, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE REHNQUIST took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring in part.

With JUSTICE O'CONNOR, I join Parts I, III, and IV of the Court's opinion and the judgment of the Court. I also agree that the Court's discussion of the absolute immunity issue is unnecessary for the resolution of this case. I write separately to emphasize my agreement with JUSTICE STEVENS that the Court's extended discussion of this issue reaches the wrong conclusion.

In *Gravel* v. *United States*, 408 U. S. 606 (1972), we held that aides of Members of Congress who implement the legislative policies and decisions of the Member enjoy the same absolute immunity from suit under the Speech and Debate Clause that the Members themselves enjoy. As I noted in dissent in *Harlow* v. *Fitzgerald*, 457 U. S. 800, 822 (1982), the logic underlying *Gravel* applies equally to top Executive aides. A Cabinet officer—and surely none more than the Attorney General—is an "aide" and arm of the President in

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Court's handling of the case precludes any suggestion that the wiretap was either (1) authorized for criminal investigatory purposes, or (2) authorized for some purpose unrelated to national security.

the execution of the President's constitutional duty to "take Care that the Laws be faithfully executed." It is an astonishing paradox that the aides of the 100 Senators and 435 Representatives share the absolute immunity of the Member, but the President's chief aide in protecting internal national security does not. I agree that the petitioner was entitled to absolute immunity for actions undertaken in his exercise of the discretionary power of the President in the area of national security.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE joins, concurring in part.

I join Parts I, III, and IV of the majority opinion and the judgment of the Court. Our previous cases concerning the qualified immunity doctrine indicate that a defendant official whose conduct did not violate clearly established legal norms is entitled to avoid trial. *Davis* v. *Scherer*, 468 U. S. 183 (1984); *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982). This entitlement is analogous to the right to avoid trial protected by absolute immunity or by the Double Jeopardy Clause. Where the district court rejects claims that official immunity or double jeopardy preclude trial, the special nature of the asserted right justifies immediate review. The very purpose of such immunities is to protect the defendant from the burdens of trial, and the right will be irretrievably lost if its denial is not immediately appealable. See *Helstoski* v. *Meanor*, 442 U. S. 500, 506–508 (1979); *Abney* v. *United States*, 431 U. S. 651, 660–662 (1977). I agree that the District Court's denial of qualified immunity comes within the small class of interlocutory orders appealable under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949).

Because I also agree that the District Court erred in holding that petitioner's authorization of the wiretaps in 1970 violated legal rights that were clearly established at the time, I concur in the judgment of the Court. The conclusion that

petitioner is entitled to qualified immunity is sufficient to resolve this case, and therefore I would not reach the issue whether the Attorney General may claim absolute immunity when he acts to prevent a threat to national security. Accordingly, I decline to join Parts II and V of the Court's opinion.

JUSTICE STEVENS, concurring in the judgment.

Some public officials are "shielded by absolute immunity from civil damages liability." *Nixon* v. *Fitzgerald*, 457 U. S. 731, 748 (1982). For Members of Congress that shield is expressly provided by the Constitution.[1] For various state officials the shield is actually a conclusion that the Congress that enacted the 1871 Civil Rights Act did not intend to subject them to damages liability.[2] Federal officials have also been accorded immunity by cases holding that Congress did not intend to subject them to individual liability even for constitutional violations. *Bush* v. *Lucas*, 462 U. S. 367 (1983). The absolute immunity of the President of the United States rests, in part, on the absence of any indication that the authors of either the constitutional text or any relevant statutory text intended to subject him to damages liability predicated on his official acts.

The practical consequences of a holding that no remedy has been authorized against a public official are essentially the same as those flowing from a conclusion that the official has absolute immunity. Moreover, similar factors are evaluated in deciding whether to recognize an implied cause of action or a claim of immunity. In both situations, when Congress is

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[1] "The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." U. S. Const., Art. I, § 6, cl. 1.

[2] See, *e. g.*, *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *Pierson* v. *Ray*, 386 U. S. 547 (1967); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976).

silent, the Court makes an effort to ascertain its probable intent. In my opinion, when Congress has legislated in a disputed area, that legislation is just as relevant to any assertion of official immunity as to the analysis of the question whether an implied cause of action should be recognized.

In Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[3] Congress enacted comprehensive legislation regulating the electronic interception of wire and oral communications. See 18 U. S. C. §§ 2510–2520. One section of that Act, § 2511(3) (1976 ed.), specifically exempted "any wire or oral communication intercepted by authority of the President" for national security purposes.[4] In *United States* v. *United States District Court*, 407 U. S. 297 (1972) *(Keith)*, the Court held that certain wiretaps authorized by the Attorney General were covered by the proviso in § 2511(3) and therefore exempt from the prohibitions in Title III. *Id.*, at 301–308.[5] The wiretap in this case was authorized on

[3] 82 Stat. 212.

[4] At the time the Attorney General authorized the wiretap involved in this case 18 U. S. C. § 2511(3) (1976 ed.) provided:

"Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. *Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.* The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power" (emphasis added).

As the Court points out, *ante*, at 514, n. 1, this section has been repealed.

[5] Attorney General Mitchell's affidavit justifying the warrantless electronic surveillance in *Keith* is quoted in the Court's opinion. 407 U. S.,

November 6, 1970, by then Attorney General Mitchell. The affidavit later submitted to the District Court justifying the wiretap on national security grounds is a virtual carbon copy of the justification the Attorney General offered for the electronic surveillance involved in *Keith*. App. 23. For that reason, on the authority of *Keith*, the Court holds that this case involves a national security wiretap undertaken under the "authority of the President" which is exempted from Title III by § 2511(3). See *ante*, at 532–533, n. 11, and 535–536, n. 13.

The Court's determination in this case and in *Keith* that Attorney General Mitchell was exercising the discretionary "power of the President" in the area of national security when he authorized these episodes of surveillance inescapably leads to the conclusion that absolute immunity attached to the special function then being performed by Mitchell. In *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), the Court explicitly noted that absolute immunity may be justified for Presidential "aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy . . . to protect the unhesitating performance of functions vital to the national interest." *Id.*, at 812. In "such 'central' Presidential domains as foreign policy and national security" the President cannot "discharge his singularly vital mandate without delegating functions nearly as sensitive as his own." *Id.*, at 812, n. 19.

Here, the President expressly had delegated the responsibility to approve national security wiretaps to the Attorney General.[6] The Attorney General determined that the wire-

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at 300–301, n. 2. In his separate opinion disagreeing with the Court's construction of § 2511(3), JUSTICE WHITE pointed out that the language of that section by no means compelled the conclusion that the Court reached. See *id.*, at 336–343. The Court's construction of § 2511(3) is nevertheless controlling in this case.

[6] See Memorandum for Heads of Executive Departments and Agencies (June 30, 1965), reprinted in *United States* v. *United States District Court for Eastern Dist. of Mich., Southern Div.*, 444 F. 2d 651, 670–671 (CA6 1971), aff'd, 407 U. S. 297 (1972).

tap in this case was essential to gather information about a conspiracy that might be plotting to kidnap a Presidential adviser and sabotage essential facilities in Government buildings. That the Attorney General was too vigorous in guaranteeing the personal security of a Presidential aide and the physical integrity of important Government facilities does not justify holding him personally accountable for damages in a civil action that has not been authorized by Congress.

When the Attorney General, the Secretary of State, and the Secretary of Defense make erroneous decisions on matters of national security and foreign policy, the primary liabilities are political. Intense scrutiny, by the people, by the press, and by Congress, has been the traditional method for deterring violations of the Constitution by these high officers of the Executive Branch. Unless Congress authorizes other remedies, it presumably intends the retributions for any violations to be undertaken by political action. Congress is in the best position to decide whether the incremental deterrence added by a civil damages remedy outweighs the adverse effect that the exposure to personal liability may have on governmental decisionmaking. However the balance is struck, there surely is a national interest in enabling Cabinet officers with responsibilities in this area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.[7]

The passions aroused by matters of national security and foreign policy[8] and the high profile of the Cabinet officers

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[7] Cf. *Pierson* v. *Ray*, 386 U. S. 547, 554 (1967) ("[A judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice and corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation"); *Imbler* v. *Pachtman*, 424 U. S., at 424–425 ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages").

[8] Cf. *Pierson* v. *Ray*, 386 U. S., at 554 ("It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants").

with functions in that area make them "easily identifiable target[s] for suits for civil damages." *Nixon* v. *Fitzgerald*, 457 U. S., at 753. Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety.[9] The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

If the Attorney General had violated the provisions of Title III, as JUSTICE WHITE argued in *Keith*, he would have no immunity. Congress, however, had expressly refused to enact a civil remedy against Cabinet officials exercising the President's powers described in § 2511(3). In that circumstance, I believe the Cabinet official is entitled to the same absolute immunity as the President of the United States. Indeed, it is highly doubtful whether the rationale of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971), even supports an implied cause of action for damages after Congress has enacted legislation comprehensively regulating the field of electronic surveillance but has specifically declined to impose a remedy for the national security wiretaps described in § 2511(3). See *id.*, at 396–397; *Bush* v. *Lucas*, 462 U. S. 367, 378 (1983). Congress' failure to act after careful consideration of the matter is a factor counselling some hesitation.

Accordingly, I concur in the judgment to the extent that it requires an entry of summary judgment in favor of former Attorney General Mitchell.

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[9] The many lawsuits filed against Attorney General Mitchell for his authorization of pre-*Keith* wiretaps is only one example of such litigation. See *ante*, at 522, n. 6.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join Parts I and II of the Court's opinion, for I agree that qualified immunity sufficiently protects the legitimate needs of public officials, while retaining a remedy for those whose rights have been violated. Because denial of absolute immunity is immediately appealable, *Nixon* v. *Fitzgerald*, 457 U. S. 731, 743 (1982), the issue is squarely before us and, in my view, rightly decided.

I disagree, however, with the Court's holding that the qualified immunity issue is properly before us. For the purpose of applying the final judgment rule embodied in 28 U. S. C. §1291, I see no justification for distinguishing between the denial of Mitchell's claim of qualified immunity and numerous other pretrial motions that may be reviewed only on appeal of the final judgment in the case. I therefore dissent from its holding that denials of qualified immunity, at least where they rest on undisputed facts, are generally appealable.

I

The Court acknowledges that the trial court's refusal to grant Mitchell qualified immunity was not technically the final order possible in the trial court. If the refusal is to be immediately appealable, therefore, it must come within the narrow confines of the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), and its progeny. Although the Court has, over the years, varied its statement of the *Cohen* test slightly, the underlying inquiry has remained relatively constant. "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978).

We have always read the *Cohen* collateral order doctrine narrowly, in part because of the strong policies supporting

the § 1291 final judgment rule. The rule respects the responsibilities of the trial court by enabling it to perform its function without a court of appeals peering over its shoulder every step of the way. It preserves scarce judicial resources that would otherwise be spent in costly and time-consuming appeals. Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken. Equally important, the final judgment rule removes a potent weapon of harassment and abuse from the hands of litigants. As Justice Frankfurter, writing for the Court in *Cobbledick* v. *United States*, 309 U. S. 323, 325 (1940), noted, the rule

> "avoid[s] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

In many cases in which a claim of right to immediate appeal is asserted, there is a sympathetic appellant who would undoubtedly gain from an immediate review of his individual claim. But lurking behind such cases is usually a vastly larger number of cases in which relaxation of the final judgment rule would threaten all of the salutory purposes served by the rule. Properly applied, the collateral order doctrine is necessary to protect litigants in certain narrow situations. Given the purposes of the final judgment rule, however, we should not relax its constraints unless we can be certain that all three of the *Cohen* criteria are satisfied. In this case, I find it unnecessary to address the first criterion—finality—because in my view a trial court's denial of qualified immunity

is neither "completely separate from the merits" nor "effectively unreviewable on appeal from a final judgment."

A

Although the qualified immunity question in this suit is not identical to the ultimate question on the merits, the two are quite closely related. The question on the merits is whether Mitchell violated the law when he authorized the wiretap of Davidon's phone without a warrant. The immunity question is whether Mitchell violated clearly established law when he authorized the wiretap of Davidon's phone without a warrant. Assuming with the Court that all relevant factual disputes in this case have been resolved, a necessary implication of a holding that Mitchell was not entitled to qualified immunity would be a holding that he is indeed liable. Moreover, a trial court seeking to answer either question would refer to the same or similar cases and statutes, would consult the same treatises and secondary materials, and would undertake a rather similar course of reasoning. At least in the circumstances presented here, the two questions are simply not completely separate.

The close relationship between the immunity and merits questions is not a consequence of the special circumstances of this case. On the Court's view, there were no issues of material fact between the parties concerning the events surrounding the Davidon wiretap.[1] For that reason, both the immunity and the merits questions would be readily decidable on summary judgment. Yet a case with more divergence on the facts would present the same congruence of merits and immunity questions. If, for instance, the parties differed concerning whether Mitchell had in fact authorized the wiretaps, Mitchell would perhaps still have been able to

[1] As I point out in Part II, *infra*, the Court's view seriously misrepresents the dispute between the parties.

move for qualified immunity on the basis of undisputed facts. Nonetheless, even in such a case, the question whether the trial court should grant such a motion would have been closely related to the question whether the trial court should grant Mitchell a summary judgment motion on the merits, and *that* question is in no sense collateral to the ultimate question on the merits.[2]

I thus find the application of the second prong of the *Cohen* test to result in a straightforward preclusion of interlocutory appeal. Our prior cases confirm this result. In the past, we have found, *inter alia*, double jeopardy claims, *Abney* v. *United States*, 431 U. S. 651 (1977), claims of excessive bail, *Stack* v. *Boyle*, 342 U. S. 1 (1951), claims of absolute immunity, *Nixon* v. *Fitzgerald*, 457 U. S., at 742–743, and disputes concerning whether a defendant was required to post a security bond in certain circumstances, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), to be separate from the merits of the underlying actions.[3] None of these

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[2] I thus do not believe that mere "factual overlap," *ante*, at 529, n. 10, is sufficient to show lack of separability. Rather, it is the *legal* overlap between the qualified immunity question and the merits of the case that renders the two questions inseparable. As the text makes clear, when a trial court renders a qualified immunity decision on a summary judgment motion, it must make a legal determination very similar to the legal determination it must make on a summary judgment motion on the merits. Similarly, there may be cases in which, after all of the evidence has been introduced, the defendant official moves for a directed verdict on the ground that the evidence actually produced at trial has failed to make a factual issue of the question whether the defendant violated clearly established law. The trial court's decision on the defendant's directed verdict motion would involve legal questions quite similar to a motion by the defendant for a directed verdict on the merits of the case. The point is that, regardless of when the defendant raises the qualified immunity issue, it is similar to the question on the merits at the same stage of the trial. In contrast, the trial court's decision on absolute immunity or double jeopardy—at whatever stage it arises—will ordinarily not raise a legal question that is the same, or even similar, to the question on the merits of the case.

[3] See also *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (claim of immunity under Speech and Debate Clause); *Eisen* v. *Carlisle & Jacquelin*, 417

issues would necessarily be conclusive or even relevant to the question whether the defendant is ultimately liable on the merits.[4] Nor will a decision on any of these questions be likely to require an analysis, research, or decision that is at all related to the merits of the case.

In an attempt to avoid the rigors of the second prong of the collateral order doctrine, the Court holds that "a claim of immunity is *conceptually distinct from* the merits of the plaintiff's claim that his rights have been violated." *Ante*, at 527–528 (emphasis added). Our previous cases, especially those of recent vintage, have established a more exacting standard. The ordinary formulation is from *Coopers & Lybrand;* we stated there that an interlocutory order may be considered final for purposes of immediate appeal only if it "resolve[s] an important issue *completely separate from* the merits of the action." 437 U. S., at 468 (emphasis added). The Court has used this formulation in *Richardson-Merrell Inc.* v. *Koller*, *ante*, p. 424, *Flanagan* v. *United States*, 465 U. S. 259, 265 (1984), *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 265 (1982) *(per curiam)*, and *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S. 368, 375 (1981). In *Abney* v. *United States*, *supra*, we described the same factor by noting that the challenged order "resolved an issue *com-*

U. S. 156 (1974) (order allocating costs of notice in class action); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U. S. 684 (1950) (order vacating attachment of ship in maritime case); *Roberts* v. *United States District Court*, 339 U. S. 844 (1950) (order denying *in forma pauperis* status).

[4] I do not suggest, as the Court seems to think, that double jeopardy or absolute immunity rulings are not "controlling" of the question whether the defendant will ultimately be liable. See *ante*, at 528, n. 9. Rather, these rulings are not generally conclusive or relevant to the question whether the defendant is liable *on the merits*. Of course double jeopardy or absolute immunity rulings can be outcome determinative, as could a ruling on qualified immunity—or on the application of a statute of limitations, a claim of improper venue, lack of subject-matter jurisdiction, failure to join an indispensable party, or the like. The question to be answered is not whether a given issue is outcome determinative, but whether its resolution is closely related to the resolution of the merits of the case.

pletely collateral to the cause of action asserted." *Id.*, at 658 (emphasis added).

Although the precise outlines of the "conceptual distinction" test are not made clear, the only support the Court has for its conclusion is the argument that "[a]ll [an appellate court] need determine is a question of law." *Ante*, at 528.[5] The underlying assumption of the Court's "conceptual distinction" test thus seems to be that questions of law are more likely to be separate from the merits of a case than are questions of fact. This seems to me to be entirely wrong; the legal, rather than factual, nature of a given question simply has nothing to do with whether it is separate from the merits. Although an appellate court *could* provide interlocutory review of legal issues, the final judgment rule embodies Congress' conclusion that appellate review of interlocutory legal and factual determinations should await final judgment. By focusing on the legal nature of the challenged trial court order, the Court's test effectively substitutes for the traditional test of *completely separate from* the merits a vastly less stringent analysis of whether the allegedly appealable issue is *not identical to* the merits.

Even if something less than complete separability were required, the Court's toothless standard disserves the im-

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[5] The Court also states that "[a]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim." *Ante*, at 528. The first part of this statement is correct, and would equally be true of any motion for judgment on the pleadings. Yet I have never seen a plausible argument that a motion for judgment on the pleadings is immediately appealable, in part because such a motion is plainly *not* separable from the merits of the case. The second part of the statement is also correct, and does indeed explain the difference between a qualified immunity determination and an ordinary motion for judgment on the pleadings or summary judgment motion. Yet the fact that a qualified immunity determination is *different* in some respect from a judgment on the pleadings is hardly ground for a finding that it is sufficiently separate to be immediately appealable.

portant purposes underlying the separability requirement.[6] First, where a pretrial issue is entirely separate from the merits, interlocutory review may cause delay and be unjustified on various grounds, but it at least is unlikely to require repeated appellate review of the same or similar questions. In contrast, where a pretrial issue is closely related to the merits of a case and interlocutory review is permitted, post-judgment appellate review is likely to require the appellate court to reexamine the same or similar legal issues. The Court's holding today has the effect of requiring precisely this kind of repetitious appellate review. In an interlocutory appeal on the qualified immunity issue, an appellate court must inquire into the legality of the defendant's underlying conduct. As the Court has recently noted, "[m]ost pretrial orders of district judges are ultimately affirmed by appellate courts." *Richardson-Merrell Inc.* v. *Koller, ante,* at 434. Thus, if the trial court is, as usual, affirmed, the appellate court must repeat the process on final judgment. Although I agree with the Court that the legal question in each review would be "conceptually" different, the connection between the research, analysis, and decision of each of the issues is apparent; much of the work in reviewing the final judgment would be duplicative.

A second purpose of the separability requirement derives from our recognition that resolution of even the most abstract legal disputes is advanced by the presence of a con-

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[6] The "conceptual distinction" test is also inconsistent with the Court's decision in *Richardson-Merrell Inc.* v. *Koller, ante,* p. 424. The Court here notes that "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Ante,* at 528–529. Yet the *Richardson-Merrell* Court evidently believes that the attorney disqualification issue is not separable from the merits because the court of appeals must evaluate, *inter alia,* "respondent's claim on the merits, [and] the relevance of the alleged instances of misconduct to the attorney's zealous pursuit of that claim." *Ante,* at 440.

crete set of facts. If appeal is put off until final judgment, the fuller development of the facts at that stage will assist the appellate court in its disposition of the case. Simply put, an appellate court is best able to decide whether given conduct was prohibited by established law if the record in the case contains a full description of that conduct. See *Kenyatta* v. *Moore*, 744 F. 2d 1179, 1185–1186 (CA5 1984).

In short, the Court's "conceptual distinction" test for separability finds no support in our cases and fails to serve the underlying purposes of the final judgment rule. To the extent it requires that only trial court orders concerning matters of law be appealable, it requires only what I had thought was a condition of *any* appellate review, interlocutory or otherwise. The additional thrust of the test seems to be that an appealable order must not be identical to the merits of the case. If the test for separability is to be this weak, I see little profit in maintaining the fiction that it remains a prerequisite to interlocutory appeal.

B

The Court states that "[a]t the heart of the issue before us," *ante*, at 525, is the third prong of the *Cohen* test: whether the order is effectively unreviewable upon ultimate termination of the proceedings. The Court holds that, because the right to qualified immunity includes a right not to stand trial unless the plaintiff can make a material issue of fact on the question of whether the defendant violated clearly established law, it cannot be effectively vindicated *after* trial. Cf. *Abney* v. *United States*, 431 U. S. 651 (1977).

If a given defense to liability in fact encompasses a right not to stand trial under the specified circumstances, one's right to that defense is effectively unreviewable on appeal from final judgment. For instance, if one's right to summary judgment under Federal Rule of Civil Procedure 56 were characterized as a right not to stand trial where the op-

posing party has failed to create a genuine issue of material fact, denials of summary judgment motions would be immediately appealable, at least under the third prong of the *Cohen* test. Similarly, if the statute of limitations gave defendants a right not to be tried out of time, denial of a statute of limitations defense would be immediately appealable insofar as the third *Cohen* test is concerned. Similar results would follow with a host of constitutional (*e. g.*, right to jury trial, right to due process), statutory (*e. g.*, venue, necessary parties), or other rights; if the right be characterized as a right not to stand trial except in certain circumstances, it follows ineluctably that the right cannot be vindicated on final judgment.

The point, of course, is that the characterization of the right at issue determines the legal result. In each case, therefore, a careful inquiry must be undertaken to determine whether it is necessary to characterize the right at issue as a right not to stand trial. The final judgment rule presupposes that each party must abide by the trial court's judgments until the end of the proceedings before gaining the opportunity for appellate review. To hold that a given legal claim is in fact an immunity from trial is to except a privileged class from undergoing the regrettable cost of a trial. We should not do so lightly.

The Court states that *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982), extended the qualified immunity doctrine in part to avoid imposition of "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.*, at 816. In *Harlow*, however, we chose to advance this purpose by modifying the substantive standards governing qualified immunity. By making the defense easier to prove on a summary judgment motion, *Harlow* did relieve many officials of undergoing the costs of trial. Yet *Harlow* fails to answer the question before the Court today: Having given extra protection to public officials by adjusting liability standards

in *Harlow*, need we in addition take the extraordinary step of excepting such officials from the operation of the final judgment rule?

The Court advances three grounds in support of its result. First, it notes that a defendant government official is entitled to dismissal if the plaintiff fails to state a claim of violation of clearly established law. *Ante*, at 526. This, although true, merely restates the standard of liability recognized in *Harlow;* it fails to justify the additional step taken by the Court today. Second, the Court states that a defendant official is entitled to summary judgment if the plaintiff is unable to create a genuine issue of material fact on this issue. This is also true, but again merely restates the ordinary standard for summary judgment under Rule 56(c).[7] Finally, the Court declares that "[t]he entitlement is an *immunity from suit* rather than a mere defense to liability," and is thus lost if a case is erroneously permitted to go to trial. *Ante*, at 526. Although the Court may believe that italicizing the words "immunity from suit" clarifies its rationale, I doubt that the ordinary characterization of a wide variety of legal claims as "immunities"[8] establishes that trial court orders rejecting

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[7] "The judgment sought [in a summary judgment motion] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. Rule Civ. Proc. 56(c).

[8] The numerous legal rights traditionally recognized as immunities include everything from the now-dormant charitable immunity in tort law, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 133 (5th ed. 1984), to the state-action immunity in antitrust law, see *Parker* v. *Brown*, 317 U. S. 341 (1943), and the doctrine of sovereign immunity. Federal statutes also contain numerous provisions granting immunities. See, *e. g.*, 15 U. S. C. § 78iii(b) (good-faith immunity for self-regulatory organizations from liability for disclosures relating to financial difficulties of certain securities dealers); 33 U. S. C. § 1483 (immunity for foreign government vessels from pollution control remedies); 46 U. S. C. § 1304 (immunities of carrier of goods by sea); 46 U. S. C. App. § 1706

such claims are necessarily unreviewable at the termination of proceedings.

In my view, a sober assessment of the interests protected by the qualified immunity defense counsels against departing from normal procedural rules when the defense is asserted. The Court claims that subjecting officials to trial may lead to "'distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.'" *Ante*, at 526, quoting *Harlow* v. *Fitzgerald*, *supra*, at 816. Even if I agreed with the Court that in the post-*Harlow* environment these evils were all real, I could not possibly agree that they justify the Court's conclusion. These same ill results would flow from an adverse decision on *any* dispositive preliminary issue in a lawsuit against an official defendant—whether based on a statute of limitations, collateral estoppel, lack of jurisdiction, or the like. A trial court is often able to resolve these issues with considerable finality, and the trial court's decision on such questions may often be far more separable from the merits than is a qualified immunity ruling. Yet I hardly think the Court is prepared to hold that a government official suffering an adverse ruling on any of these issues would be entitled to an immediate appeal.

In any event, I do not think that the evils suggested by the Court pose a significant threat, given the liability standards established in *Harlow*. We held in *Harlow* that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U. S., at 818. I have no doubt that trial judges employing this standard will have little difficulty in achieving *Harlow*'s goal of early dismissal of frivolous

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(1982 ed., Supp. III) (immunity from antitrust laws for certain agreements among carriers of goods by sea).

or insubstantial lawsuits. The question is whether anything is to be gained by permitting interlocutory appeal in the remaining cases that would otherwise proceed to trial.

Such cases will predictably be of two types. Some will be cases in which the official *did* violate a clearly established legal norm. In these cases, nothing is to be gained by permitting interlocutory appeal because they should proceed as expeditiously as possible to trial. The rest will be cases in which the official did not violate a clearly established legal norm. Given the nature of the qualified immunity determination, I would expect that these will tend to be quite close cases, in which the defendant violated a legal norm but in which it is questionable whether that norm was clearly established. Many of these cases may well be appealable as certified interlocutory appeals under 28 U. S. C. § 1292(b) or, less likely, on writ of mandamus. Cf. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S., at 378, n. 13; *Coopers & Lybrand* v. *Livesay*, 437 U. S., at 474–475. It is only in the remaining cases that the Court's decision today offers the hope of an otherwise unavailable pretrial reversal. Out of this class of cases, interlocutory appeal is beneficial only in that still smaller subclass in which the trial court's judgment is reversed.

The question is thus whether the possibly beneficial effects of avoiding trial in this small subset of cases justify the Court's declaration that the right to qualified immunity is a right not to stand trial at all. The benefits seem to me to be rather small. Most meritless cases will be dismissed at the early stages, thus minimizing the extent to which officials are distracted from their duties. Officials aware of the extensive protection offered by qualified immunity would be deterred only from activities in which there is at least a strong scent of illegality; deterrence from many such activities (those that are clearly unlawful) is precisely one of the goals of official liability. Finally, I cannot take seriously the Court's suggestion that officials who would otherwise be deterred from taking public office will have their confidence

restored by the possibility that mistaken trial court qualified immunity rulings in some small class of cases that might be brought against them will be overturned on appeal before trial.

Even if there were some benefits to be gained by granting officials a right to immediate appeal, a rule allowing immediate appeal imposes enormous costs on plaintiffs and on the judicial system as a whole.[9] Most claims entitled to immediate appeal have a self-limiting quality. See *United States* v. *MacDonald*, 435 U. S. 850, 862 (1978) (relying in part on the fact that "there is nothing about the circumstances that will support a speedy trial claim which inherently limits the availability of the claim" to find it not appealable). Double jeopardy claims, for instance, are available only to criminal defendants who have been previously tried. Similarly, the interlocutory civil appeals the Court permitted in *Cohen* are obviously limited to a small number of cases. See also *Helstoski* v. *Meanor*, 442 U. S. 500 (1979) (Speech and Debate Clause immunity); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe*, 339 U. S. 684 (1950) (order denying attachment of ship); *Roberts* v. *United States District Court*, 339 U. S. 844 (1950) *(per curiam)* (order denying right to proceed *in forma pauperis*). Although absolute immunity is perhaps a more widely available claim, its ambit nonetheless remains restricted to officials performing a few extremely sensitive functions. See, *e. g.*, *Nixon* v. *Fitzgerald*, 457 U. S. 731 (1982) (the President); *Imbler* v. *Pachtman*, 424 U. S. 409 (1976) (prosecutors); *Pierson* v. *Ray*, 386 U. S. 547 (1967) (judges); *Tenney* v. *Brandhove*, 341 U. S. 367 (1951) (legislators). In contrast, the right to interlocutory appeal recognized today is generally available to (and can be expected to be widely pursued by) virtually any governmental

[9] It also imposes costs on the defendant officials and the public. Those who pursue interlocutory appeals can be expected ordinarily to lose. See *Richardson-Merrell Inc.* v. *Koller*, *ante*, p. 424. Permitting an interlocutory appeal will thus in most cases merely divert officials from their duties for an even longer time than if no such appeals were available.

official who is sued in his personal capacity,[10] regardless of the merits of his claim to qualified immunity or the strength of the claim against him. As a result, I fear that today's decision will give government officials a potent weapon to use against plaintiffs, delaying litigation endlessly with interlocutory appeals.[11] The Court's decision today will result in denial of full and speedy justice to those plaintiffs with strong claims on the merits and a relentless and unnecessary increase in the caseload of the appellate courts.

II

Even if I agreed with the Court's conclusion that denials of qualified immunity that rest on undisputed facts were immediately appealable and further agreed with its conclusion that Mitchell was entitled to qualified immunity,[12] I could not agree with the Court's mischaracterization of the proceedings in this case to find that Mitchell was entitled to summary judgment on the qualified immunity issue. From the outset, Forsyth alleged that the Davidon wiretap was not a national security wiretap, but was instead a simple attempt to spy on political opponents. This created an issue of fact as to the nature of the wiretap in question, an issue that the trial court never resolved. To hold on this record that Mitchell was entitled to summary judgment is either to engage in *de novo* factfinding—an exercise that this Court has neither the authority nor the resources to do—or intentionally to disregard the record below to achieve a particular result in this case.

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[10] Of course, an official sued in his official capacity may not take advantage of a qualified immunity defense. See *Brandon* v. *Holt*, 469 U. S. 464 (1985).

[11] The instant case is an apt illustration. The proceedings in the trial court would likely have concluded in 1979 were it not for the two interlocutory appeals filed by the Government.

[12] Given my conclusion that the Court of Appeals had no jurisdiction over Mitchell's interlocutory appeal, I need not reach the issue of whether he was entitled to qualified immunity.

The Court purports to find two justifications for its conclusion that the trial court in fact resolved this issue in Mitchell's favor. It states: "The District Court held a hearing on the purpose of the wiretap and took Mitchell at his word that the wiretap was a national security interception, not a prosecutorial function for which absolute immunity was recognized." *Ante*, at 535, n. 13. This is true, but fails to demonstrate any resolution of the disputed factual issue. In its 1982 ruling, the trial court indeed said that it "has taken defendant Mitchell at his word" when he claimed that he approved the Davidon wiretaps as part of a national security investigation. App. to Pet. for Cert. 59a. In this section of its opinion, reproduced *id.*, at 56a–60a, the trial court was determining whether Mitchell was entitled to absolute immunity *as a prosecutor* in authorizing the Davidon wiretap. Thus, two paragraphs below the quoted statement, the trial court said:

> "[R]egardless of whether the Davidon wiretap was motivated by a legitimate national security concern or a good faith belief that there existed a legitimate national security concern, as the defendants contend, *or was an invasion of the privacy of political dissidents conducted under the guise of national security, as the plaintiff contends*, there is no doubt that defendant Mitchell has consistently taken the position that the Davidon tap 'arose in the context of a purely investigative or administrative function' on his part." *Id.*, at 59a (emphasis added).

The trial court quite properly took Mitchell "at his word" for purposes of ruling against him on his prosecutorial immunity claim. It would have been quite improper for the court to take Mitchell "at his word" for any other purpose, and the court never made its own finding of fact on the disputed issue.

The Court also attempts to construct an argument that the trial court, as a matter of logic, must have made the finding of fact in question. Otherwise, according to the Court, "the

qualified immunity question would never have been reached, for the tap would clearly have been illegal under Title III, and qualified immunity hence unavailable." *Ante*, at 535, n. 13. The Court's argument seems to be that the trial court should have decided the legality of the wiretap under Title III before going on to the qualified immunity question, since that question arises only when considering the legality of the wiretap under the Constitution. Perhaps the trial court should have proceeded as the Court wants, although the question is not nearly so simple as the Court suggests, and I would have thought that a trial court in a complicated case must be accorded great discretion in determining its order of decision. At any rate, speculations as to what the trial court ought to have decided and in what order are irrelevant; Forsyth surely should not forfeit his legal claim because (arguably) the trial court went about its task inartfully. There is not a word in this record to suggest that the trial court actually made any determination on the disputed issue. I am thus at a loss to understand on what legal principle, aside from sympathy for the defendant or hostility to the plaintiff, the Court bases its decision that Mitchell was entitled to summary judgment.

I dissent.

CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS PENSION FUND ET AL. *v.* CENTRAL TRANSPORT, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82–2157. Argued November 27, 1984—Decided June 19, 1985

Petitioners are multiemployer benefit plans governed by the Employee Retirement Income Security Act of 1974 (ERISA). The plans operate under trust agreements for the purpose of providing health, welfare, and pension benefits to employees performing work that is covered by collective-bargaining agreements negotiated between a labor union and respondent trucking companies. Under these collective-bargaining agreements, each employer must make weekly contributions to petitioners for each such employee, and each employer agrees to be bound by the trust agreements. Because they are so large, petitioners rely on employer self-reporting to determine the extent of an employer's contribution liability, and police this self-reporting system by conducting random audits of the participating employers' records. When respondents refused to allow petitioners' requested audit of respondents' payroll, tax, and personnel records, including records of employees who respondents claimed were not plan participants, petitioners filed an action in Federal District Court seeking an order permitting the audit. The District Court granted summary judgment in favor of petitioners. The Court of Appeals reversed, holding that petitioners had to show "reasonable cause" to believe that a specific employee was covered by the plans before gaining a right of access to that employee's records.

Held: Respondents must allow petitioners to conduct the requested audit. Pp. 565–581.

(a) Various provisions of the trust agreements granting the trustees power to enable them to administer the trusts properly, including a provision granting power to demand and examine pertinent employer records, support the right to audit claimed by petitioners. Moreover, petitioners' assertion that the requested audit is highly relevant to the trust agreements' legitimate interests fully conforms to generally accepted auditing standards. Pp. 565–568.

(b) Petitioners' trustees' interpretation of the trust agreements as authorizing the requested audit is not inconsistent with ERISA, and indeed, is entirely reasonable in light of ERISA's policies. Rather

than explicitly enumerating all of the powers and duties of trustees, Congress invoked the common law of trusts to define the scope of their authority and responsibility. Under the common law, trustees have all such powers as are necessary or appropriate for the carrying out of the trust purposes, and an examination of ERISA's structure in light of the common law leaves no doubt as to the validity and weight of the audit goals on which petitioners rely. Both the concerns for fully informing participants of their rights and status under a plan and for assuring the financial integrity of the plans by determining the class of potential benefit claimants and by holding employers to the full and prompt fulfillment of their contribution obligations are proper and weighty within ERISA's framework. Pp. 568–574.

(c) A benefit plan should not have to rely on union monitoring of an employer's compliance with its trust obligations as an alternative to audits by the plans themselves. Cf. *Schneider Moving & Storage Co.* v. *Robbins*, 466 U. S. 364. A trustee's duty extends to all participants and beneficiaries of a multiemployer plan, whereas a union's duty is confined to current employees employed in the bargaining unit in which it has representational rights. Nor would the Department of Labor's policing of employer compliance be an acceptable alternative. That Department has insufficient resources for such policing, and neither ERISA's structure nor its legislative history shows any congressional intent that benefit plans should rely primarily on centralized federal monitoring of employer contributions requirements. Pp. 575–579.

(d) To rely on covered employees themselves to come forward to assure that employers make the required contributions would not be feasible. While ERISA's reporting requirements are designed to assure that participants receive information about their status and rights, they do so by placing a reporting duty *on the plans*. Thus, to give participants initial notice of their status, the plans would need to know the participants' identities, the very information that the requested audit here sought to verify. P. 579.

(e) The fact that a benefit plan could bring an action against a delinquent employer as the employer's breaches of its obligations are discovered does not foreclose the plan from seeking to deter such breaches or discover them early. To suggest that a plan should be so foreclosed ignores the trustees' various fiduciary duties under ERISA and conflicts with ERISA's concern that plans should assure themselves of adequate funding by promptly collecting employer contributions. Pp. 580–581.

698 F. 2d 802, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. STEVENS, J.,

filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 582.

Russell N. Luplow argued the cause for petitioners. With him on the briefs was *Diana L. S. Peters.*

Joshua I. Schwartz argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Deputy Solicitor General Geller, Karen I. Ward,* and *Mary-Helen Mautner.*

Patrick A. Moran argued the cause for respondents. With him on the briefs were *Vivian B. Perry* and *Arthur R. Miller.**

JUSTICE MARSHALL delivered the opinion for the Court.

The issue presented is whether an employer who participates in a multiemployer benefit plan that is governed by the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 *et seq.*, must allow the plan to conduct an audit involving the records of employees who the employer denies are participants in the plan.

I

A

Petitioners are two large multiemployer benefit plans, the Central States, Southeast and Southwest Areas Pension Fund and the Central States, Southeast and Southwest Areas Health and Welfare Fund (hereinafter referred to collectively as Central States).[1] Governed by § 302(c)(5) of

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*Briefs of *amici curiae* urging reversal were filed for Arthur Young & Co. by *Carl D. Liggio;* for Bricklayers Fringe Benefit Funds—Metropolitan Area et al. by *Sheldon M. Meizlish;* and for the National Coordinating Committee for Multiemployer Plans by *Gerald M. Feder.*

Brian G. Shannon filed a brief for Deloitte Haskins & Sells as *amicus curiae* urging affirmance.

[1] As the Court of Appeals noted: "The record . . . indicates that the Funds are among the largest Taft-Hartley trust funds in the United States, that more than 13,000 employers participate and that they serve

the Labor Management Relations Act, 1947, 29 U. S. C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, 29 U. S. C. § 1001 *et seq.*, as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1208, these plans operate as trusts for the purpose of providing specified health, welfare, and pension benefits to employees performing work that is covered by collective-bargaining agreements negotiated by various affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters).

Respondents (hereinafter referred to collectively as Central Transport) are 16 interstate trucking companies, each of which, either individually or through a multiemployer association, engages in collective bargaining with the Teamsters. Pursuant to that bargaining, each has become a signatory to the National Master Freight Agreement and supplemental, individual collective-bargaining agreements. Under these collective-bargaining agreements, each employer must make weekly contributions to Central States for each employee who performs work covered by the collective-bargaining agreements, and each employer agrees to be bound by the trust agreements that govern Central States.

Because the plans are so large—with thousands of participating employers—Central States relies principally on employer self-reporting to determine the extent of an employer's liability.[2] Central States polices this self-reporting

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more than 500,000 employees whose job classifications are covered in thousands of collective bargaining agreements." 698 F. 2d 802, 811 (CA6 1983). See also *Schneider Moving & Storage Co.* v. *Robbins*, 466 U. S. 364, 373, n. 16 (1984).

[2] The District Court described this system as follows:

"Traditionally, the Central States Funds have operated on a self-reporting basis, which required the employer to initially establish a base group of employees entitled to weekly contributions and then to inform [Central States] monthly of any fluctuations in the employment status of individuals covered by the collective bargaining agreement. Central

system by conducting random audits of the records of participating employers.

B

On December 5, 1979, Central States contacted Central Transport to arrange an audit, which it described as part of a program of "'periodic reviews of participating employer contributions for the benefit of Plan Participants and their Beneficiaries.'" 522 F. Supp. 658, 662 (ED Mich. 1981). The audit was to take place at Central Transport's offices and was to encompass, among other subjects, the "'[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements.'" *Ibid.* Among the documents the auditors requested access to were payroll, tax, and other personnel records of those employees who the employer claimed were not plan participants.

Central States explained that access to these records would allow the auditors independently to determine the membership of the class entitled to participate in the plans, and thus to verify that Central Transport was making all required contributions.[3] Central Transport, however, insisted that 60% of its employees were not covered by the plans, and that Central States had no right to examine any records of noncovered employees. When Central Transport refused to allow the requested audit, Central States filed an action in Federal District Court seeking an "order permitting its auditors to conduct an independent verification of Central Transport's complete payroll records in order to determine

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States relies upon the status reports of [Central Transport] to compute an invoice statement which it forwards to Central Transport. Thus, when the employer reports the termination or layoff of an individual formerly covered by the collective bargaining agreement, Central States will adjust its records and reduce the defendant's invoice to reflect the reported change. Conversely, when an employer reports the addition of new employees, Central States will increase the invoice by an amount which corresponds to the weekly contribution figure multiplied by the number of weekly hired employees." 522 F. Supp. 658, 662 (ED Mich. 1981).

[3] See *infra*, at 566–568.

whether the duties and status of each of its employees has been accurately reported by Central Transport." *Id.* at 660.[4]

The parties agreed that the facts of the case were not in dispute, and that the court should treat their pleadings as cross-motions for summary judgment. The District Court granted summary judgment in favor of Central States. After examining Central States' contractual relationship with Central Transport and Central States' responsibilities under ERISA, the court concluded that Central States had a right to conduct the requested audit. The audit was a reasonable means of "independently verify[ing] the status and duties of all individuals employed by Central Transport in order to insure that proper benefit contribution payments are being made." *Ibid.* The court thus ordered "that Central Transport provide to the audit representatives of Central States all of the documentation requested and that the audit procedure undertaken by Central States be allowed to continue." *Ibid.*[5]

The Court of Appeals for the Sixth Circuit reversed. 698 F. 2d 802 (1983). Interpreting the collective-bargaining agreements and trust documents in light of ERISA, the Court of Appeals held that Central States had to show "reasonable cause" to believe that a specific employee was covered by the plans before gaining a right of access to that employee's records. *Id.*, at 809–812. We granted certiorari, 467 U. S. 1250 (1984), and we now reverse the judgment of the Court of Appeals.

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[4] The action was filed pursuant to § 301(a) of the Labor Management Relations Act, 1947, 29 U. S. C. § 185(a), and § 502 of ERISA, 29 U. S. C. § 1132.

[5] In reaching its decision, the District Court was "mindful of the fact that Central States ha[d] repeatedly stated that confidential payroll data [would] not be copied or removed from the Central Transport premises once the auditors have satisfied themselves that particular individuals are not performing [bargaining] unit work." 522 F. Supp., at 664.

II

The documents governing Central Transport's contractual relationship with Central States include the collective-bargaining agreements between Central Transport and various affiliates of the Teamsters and the trust agreements of the Central States plans. Generally, the collective-bargaining agreements obligate Central Transport to participate in the Central States plans and to be bound by Central States' trust agreements. The trust agreements, which have been signed by Central Transport, govern the operation of the plans.

These trust documents include a number of provisions that are highly supportive of the right to audit claimed by Central States' trustees.

A

We note first that the Pension Fund trust agreement[6] places on each participating employer the responsibility to make "continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement." App. to Pet. for Cert. A–44 (Art. III, § 1). The trustees are designated the recipients of all contributions and are "vested with all right, title and interest in and to such moneys." *Ibid.* (Art. III, § 3).

The agreement contains various specific and general grants of power to the trustees to enable them to administer the trusts properly. Most generally, the agreements authorize the trustees to "do all acts, whether or not expressly authorized . . . , which [they] may deem necessary or proper for the protection of the property held [under the trust agreement]." *Id.*, at A–47 (Art. IV, § 14(e)). The agreement also grants broad powers relating to the collection of employer contribu-

[6] The trust agreement governing the Pension Fund and the trust agreement governing the Health and Welfare Fund are identical in all pertinent respects. References will therefore be made only to the Pension Fund trust agreement.

tions, such as the power "to demand and collect the contributions of the Employers to the Fund," *id.*, at A–45 (Art. III, § 4), and the power to "take such steps . . . as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions . . . which may be owed to the Trust Fund." *Ibid.*

Among the more specific grants of trustee power is a power to demand and examine employer records:

> "Production of Records—Each employer shall promptly furnish to the Trustees, upon reasonable demand the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files and such other information as the Trustees may reasonably require in connection with the administration of the Trust. *The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust.*" *Id.*, at A–46 (Art. III, § 5) (emphasis added).

B

Central States' trustees interpret these provisions as authorizing random field audits like the one at issue in this case. In particular, they argue that the records of not-concededly-covered employees are "pertinent records" because their examination is a "proper" means of verifying that the employer has accurately determined the class of covered employees. The plans have a substantial interest in verifying the employer's determination of participant status, the trustees argue, because an employer's failure to report all those who perform bargaining unit work may prevent the plans from notifying participants and beneficiaries of their entitlements and obligations under the plans and may create

unfunded liabilities chargeable against the plans.[7] Moreover, an employer has an incentive to underreport the number of employees covered, because such underreporting would reduce his liability to the plans.

The reasonableness and propriety of the audit are confirmed, the trustees argue, by the accounting profession's generally accepted auditing standards, which articulate the elementary principle that for an auditor to verify a certain selection decision, he must refer to a universe broader than the selection itself:

> "When planning a particular sample, the auditor should consider the specific audit objective to be achieved and should determine that the audit procedure, or combination of procedures to be applied will achieve that objective. The auditor should determine that the population from which he draws the sample is appropriate for the specific audit objective. *For example, an auditor would not be able to detect understatements of an account due to omitted items by sampling the recorded items. An appropriate sampling plan for detecting such understatements would involve selecting from a source in which the omitted items are included.*" American Institute of Certified Public Accountants, Codification of Statements on Auditing Standards, AU § 350.17, p. 223 (1985) (emphasis added).

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[7] The consistent view of the Secretary of Labor is that, under ERISA's minimum participation, vesting, and benefit accrual standards for pension plans, 29 U. S. C. §§ 1052, 1053, 1054, a pension plan covered by ERISA *must* award credit "solely on the basis of service performed for a participating employer, regardless [of] whether that employer is required to contribute for such service or has made or defaulted on his required contributions." In the Secretary's judgment, "[a]ny plan term or Trustees' resolution to the contrary is . . . unlawful and unenforceable." Department of Labor Advisory Op. No. 76–89 (Aug. 31, 1976) (reprinted in App. to Pet. for Cert. A70–A71); accord, Department of Labor Advisory Op. No. 78–28A (Dec. 5, 1978) (reprinted in App. to Pet. for Cert. A71–A74).

The trustees' determination that the trust documents authorize their access to the records here in dispute has significant weight, for the trust agreement explicitly provides that "any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers." App. to Pet. for Cert. A–48 (Art. IV, § 17).[8] There has been no evidence of a bad-faith motive behind the trustees' determination of the scope of their powers under the trust agreement or behind their determination of the auditing program's propriety. The trustees assert that the requested audit is highly relevant to the trust's legitimate interests, and this assertion fully conforms to generally accepted auditing standards. Thus, if our inquiry were merely an inquiry into the trust agreement, the trustees' right to conduct the audit in question would seem clear.

III

The Court of Appeals, nonetheless, rejected the Central States trustees' interpretation of their contractual power. In the court's view, such an auditing power would be unreasonable in light of the policies and protections embodied in ERISA. We agree with the Court of Appeals that trust documents cannot excuse trustees from their duties under ERISA, and that trust documents must generally be construed in light of ERISA's policies, see 29 U. S. C. § 1104(a)(1)(D), but we find no inherent inconsistency between ERISA and the interpretation of the trust agreement offered by the Central States trustees. Indeed, we find the

[8] Similarly, the collective-bargaining agreement provides that each employer is deemed to have "ratif[ied] all action already taken or to be taken by [Trustees] within the scope of their authority." 522 F. Supp., at 661 (quoting National Master Freight Agreement, Art. 60). A trust "participation agreement" entered into by Central Transport is of similar effect, providing that Central Transport "assent[s] to . . . all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted." *Ibid.* (quoting paragraph one of the Pension Fund participation agreement).

trustees' interpretation of their documents to be entirely reasonable in light of ERISA's policies.

An examination of the duties of plan trustees under ERISA, and under the common law of trusts upon which ERISA's duties are based, makes clear that the requested audit is highly relevant to legitimate trustee concerns.

A

This Court has on a number of occasions discussed the policy concerns behind ERISA. In *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U. S. 359, 361 (1980), we noted that Congress enacted ERISA after "almost a decade of studying the Nation's private pension plans" and other employee benefit plans.[9] Congress found that there had been a "rapid and substantial" growth in the "size, scope, and numbers" of employee benefit plans and that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U. S. C. § 1001(a). But it also recognized that "owing to the inadequacy of [pre-ERISA] minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may [have been] endangered." *Ibid.* We have recognized that one of ERISA's principal purposes was "to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." 446

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[9] Although most of ERISA's legislative history focused on pension plans, Congress also studied the operation of other employee benefit plans and developed a similar regulatory framework respecting these other plans. For example, ERISA's rules concerning reporting, disclosure, and fiduciary responsibility apply to all employee benefit plans. See 29 U. S. C. §§ 1021–1031, 1101–1114. See also 29 U. S. C. § 1001(a) (stating congressional findings and policies with respect to "employee benefit plans"); 29 U. S. C. § 1002(3) (defining "employee benefit plan" as including both "pension benefit plan[s]" and "welfare benefit plan[s]"). See generally *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 91 (1983).

U. S., at 375. One of the methods of accomplishing this was the provision of "minimum standards" that would "assur[e] the equitable character of [employee benefit plans] and their financial soundness." 29 U. S. C. § 1001(a).

B

In general, trustees' responsibilities and powers under ERISA reflect Congress' policy of "assuring the equitable character" of the plans. Thus, rather than explicitly enumerating *all* of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility.[10] Under the common law of trusts, as under the Central States trust agreements, trustees are understood to have all "such powers as are necessary or appropriate for the carrying out of the purposes of the trust." 3 A. Scott, Law of Trusts § 186, p. 1496 (3d ed. 1967) (hereinafter Scott).[11]

The manner in which trustee powers may be exercised, however, is further defined in the statute through the provision of strict standards of trustee conduct, also derived from the common law of trusts—most prominently, a standard of loyalty and a standard of care. Under the former, a plan

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[10] See, *e. g.*, 29 U. S. C. § 1103(a) ("assets of an employee benefit plan shall be held in trust"); S. Rep. No. 93–127, p. 29 (1973) ("The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts"); H. R. Rep. No. 93–533, p. 11 (1973) (identical language); cf. *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 329–334 (1981) (Congress intended that union welfare funds regulated by the Taft-Hartley Act, see 29 U. S. C. § 186(c)(5), be operated under traditional trust law principles, and this desire became explicit in ERISA).

[11] Accord, G. Bogert & G. Bogert, Law of Trusts and Trustees § 551, p. 41 (2d rev. ed. 1980) (hereinafter Bogert) (trustee has the power to use all "ordinary and natural means" for accomplishing the trust's objective); Restatement (Second) of Trusts § 186(b) (1959) (hereinafter Restatement) (trustee has all powers "necessary or appropriate to carry out the purposes of the trust").

fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of providing benefits to participants and their beneficiaries; and . . . defraying reasonable expenses of administering the plan." 29 U. S. C. § 1104(a)(1)(A). See also § 1103(c)(1); cf. § 186(c)(5). Under the latter, a fiduciary "shall discharge his duties with respect to a plan . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." § 1104(a)(1)(B).[12]

An examination of the structure of ERISA in light of the particular duties and powers of trustees under the common law leaves no doubt as to the validity and weight of the audit goals on which Central States relies. ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries, and that trustees

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[12] In light of ERISA's standards, Central Transport correctly argues that the audit request would be illegitimate under the standard of loyalty if it were actually an effort by plan trustees to expand plan coverage beyond the class defined in the plans' terms or to acquire information about the employers to advance union goals. It similarly argues that the audit would be imprudent if it were clearly wasteful of plan assets or unrelated to legitimate plan concerns.

Central Transport, however, has submitted no evidence that Central States' audit program's actual goal was to expand the trust's coverage beyond that provided in the applicable collective-bargaining agreements or to acquire information for union goals; nor did it submit any evidence that the audits were unjustifiably costly. Thus, whether the auditing power claimed by Central States is consistent with ERISA must be analyzed in terms of the goal upon which Central States has rested its audit, that of policing Central Transport's "'[d]etermination of eligible Plan Participants covered by Collective Bargaining Agreements,'" 522 F. Supp., at 662 (quoting Central States' letter to Central Transport), so as to verify that Central Transport is indeed contributing all required amounts on behalf of all covered employees.

will take steps to identify all participants and beneficiaries, so that the trustees can make them aware of their status and rights under the trust's terms.

C

One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets, Bogert § 582, at 346, and this encompasses "determin[ing] exactly what property forms the subject-matter of the trust [and] who are the beneficiaries." *Id.* § 583, at 348 (footnotes omitted). The trustee is thus expected to "use reasonable diligence to discover the location of the trust property and to take control of it without unnecessary delay." *Id.*, at 355.[13] A trustee is similarly expected to "investigate the identity of the beneficiary when the trust documents do not clearly fix such party" and to "notify the beneficiaries under the trust of the gifts made to them." *Id.*, at 348–349, n. 40.

The provisions of ERISA make clear that a benefit plan trustee is similarly subject to these responsibilities, not only as a result of the general fiduciary standards of loyalty and care, borrowed as they are from the common law, but also as a result of more specific trustee duties itemized in the Act. For example, the Act's minimum reporting and disclosure standards require benefit plans to furnish all participants with various documents informing them of their rights and obligations under the plan, see, *e. g.*, 29 U. S. C. §§ 1021, 1022, 1024(b),[14] a task that would certainly include the duty of determining who is in fact a plan participant.[15] The Act also

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[13] See also Bogert 355 (where the settlor retains possession of trust assets, "the trustee must hold the settlor to [his] obligation"); 2 Scott § 175, at 1415 ("trustee is under a duty to take such steps as are reasonable to secure control of the trust property and to keep control of it").

[14] See also 29 CFR §§ 2520.104b–1—2520.104b–30 (1984).

[15] That the reporting requirements presuppose a plan's knowledge of participants' identities is highlighted by the Labor Department's determination that to comply with the minimum reporting standards a plan "must [send the prescribed material] by a method or methods of delivery

requires that a benefit plan prevent participant employers from gaining even temporary use of assets to which the plan is entitled, see § 1106(a)(1)(B) (prohibiting trustees from "caus[ing] the plan to engage in a transaction, if . . . such transaction constitutes a direct or indirect . . . extension of credit" to a participating employer), a requirement that would certainly create a trustee responsibility for assuring full and prompt collection of contributions owed to the plan.[16]

Moreover, that these trustee duties support the auditing authority claimed in this case is strongly suggested by the other provisions of ERISA as well as by the positions of the administrative agencies charged with the administration of the Act. For example, § 209 of the Act supplements the benefit plans' duties to furnish reports to plan participants by requiring employers to maintain records on employees and to furnish to benefit plans the information needed for the plans' fulfillment of their reporting duties. 29 U. S. C. § 1059. The Secretary of Labor has explicitly interpreted the trustees' duty to prevent employer use of trust assets as creating a plan duty to verify employer determinations and requiring plans to adopt systems for policing employers. And the Secretary has endorsed the appropriateness of field auditing programs for this purpose. Thus, the Secretary notes that "many multiple employer plans have adopted written procedures for the orderly collection of delinquent employer contributions which involve reasonable, diligent and systematic

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likely to result in full distribution." 29 CFR § 2520.104b–1 (1984). Mail distribution is one of the suggested methods, and more importantly, the Department cautions that "in no case is it acceptable [for a plan] merely to place copies of the material in a location frequented by participants" as a means of complying with ERISA's reporting requirements). *Ibid.*

[16] See also 29 U. S. C. § 1103(c)(1) (providing that "the assets of a plan shall never inure to the benefit of any employer"); § 1145 (requiring employers to fulfill the contribution obligations in accordance with the terms of plan documents). For a more detailed discussion of Congress' concern for assuring full and prompt compliance with contribution obligations, see Part IV–C, *infra*.

methods for the review of employer contribution accounts by means of, for example, . . . field audits." In the Department's view, plans "which do not establish and implement [such] collection procedures" may "by failing to collect delinquent contributions" be found to have violated § 406's prohibition of extensions of credit to employers. Prohibited Transaction Exemption 76–1, 41 Fed. Reg. 12740, 12741 (1976); accord, Department of Labor Advisory Op. No. 78–28A (Dec. 5, 1978) (reprinted in App. to Pet. for Cert. A71–A74).

In light of the general policies behind ERISA as well as the particular provisions of the statute, we can only conclude that there is no conflict between ERISA and those concerns offered by Central States to justify its audit program. Both the concern for fully informing participants of their rights and status under a plan and the concern for assuring the financial integrity of the plans by determining the class of potential benefit claimants and holding employers to the full and prompt fulfillment of their contribution obligations are proper and weighty within the framework of ERISA.

IV

The Court of Appeals offered a number of reasons why the requested audit would nevertheless be improper as a matter of law. The Court of Appeals largely relied on the presence of alternative means of protecting a plan's interests to conclude that a plan's access to employee records could safely be limited to those instances where a plan shows "reasonable cause" to believe that a specific employee is a participant. The court speculated that "[t]he Funds enjoy a number of protections against being called upon to dispense benefits to a participant on whose behalf no contributions or insufficient contributions were made," 698 F. 2d, at 813, that the plans thus did not need primarily to rely on its own monitoring to safeguard its interests, and that therefore "the possibility of

liability . . . on the part of . . . the Funds [could] not justify the broad audit [the trustees] seek." *Ibid.*

A

The Court of Appeals first noted that employer contributions could effectively be policed by interested unions or by the Secretary of Labor, thus diminishing the trustees' interests in independently monitoring employer compliance. Moreover, in the court's view, a plan's reliance on union or Government oversight of an employer's contributions would be more consistent with federal policies in the pension and labor fields than would be a plan's reliance on the sort of audit at issue here.

(1)

The notion that federal policy favors union enforcement of an employer's collectively bargained obligations to a benefit plan, to the exclusion of enforcement by the plan's trustees, simply did not survive last Term's decision in *Schneider Moving & Storage Co.* v. *Robbins*, 466 U. S. 364 (1984). In *Schneider*, we held that a benefit plan could bring an independent action for judicial enforcement of an employer's trust obligations, and we in large part relied on the proposition that there was no federal policy favoring trustee dependence on a union's use of a grievance and arbitration system for such enforcement.[17]

Of greatest significance here is this Court's conclusion that compelling benefit plans to rely on unions would erode the protections ERISA assures to beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of

[17] The benefit plans involved in *Schneider* were the same plans that are petitioners here, and the trust agreements at issue in *Schneider* are also the same as those here.

beneficiaries, and unions' duties toward beneficiaries are of a quite different scope.

A trustee's duty extends to all participants and beneficiaries of a multiemployer plan, while a local union's duty is confined to current employees employed in the bargaining unit in which it has representational rights. The breadth of the trustee's duty may result in a very different view of the special situations that may exist in any single unit, and, as we recognized in *Schneider*, a union's arrangements with a particular employer might compromise the broader interests of the plan as a whole:

> "These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contribution from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective-bargaining agreement would have an adverse effect on the other participants." 466 U. S., at 373 (footnotes omitted).

See also *Lewis* v. *Benedict Coal Co.*, 361 U. S. 459, 469 (1960). See generally *Schneider*, *supra*, at 376, n. 22 (the union's duty "runs only to the members of its collective-bargaining unit, and is coextensive with its statutory authority to act as the exclusive representative for all the employees within the unit").[18]

Similarly, a local union's duties to bargaining-unit workers is a general duty to act in the group's interests regarding the overall terms and conditions of employment. The trustees'

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[18] This potential conflict was also discussed in *Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 171–175 (1971), where we recognized that the interests of retirees may substantially conflict with the interests of active workers. Because of the potential conflicts, we held that retirees cannot be considered part of a collective-bargaining unit represented by a union and that retirees' benefits are not within the mandatory subjects of union-employer collective bargaining. Retirees, as beneficiaries of a pension plan, clearly are within the class to whom trustees owe a duty.

duty, in contrast, is to provide specific benefits to those who are entitled to them in accordance with the terms of a plan. That the general nature of a union's duty may result in less than full protection to individual entitlements has been well recognized in our cases, and we have accordingly refrained from making enforcement of such entitlements rest primarily on union action. See *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 742 (1981) (union goal of maximizing overall compensation for the bargaining unit as a whole may prevent it from effectively policing employer's payment to each employee of statutory minimum wages). In *Schneider*, we recognized that in the context of ERISA primary reliance on unions would allow "wide discretion and would provide only limited protection," 466 U. S., at 376, n. 22, to those participant and beneficiary rights that the statute was designed to ensure:

> "A primary union objective is 'to maximize overall compensation of its members.' Thus, it may sacrifice particular elements of the compensation package 'if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole.'" *Ibid.* (citation omitted).

See also *NLRB* v. *Amax Coal Co.*, 453 U. S. 322, 336 (1981) ("The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by [29 U. S. C. § 186(c)(5)] and ERISA, is wholly inconsistent with th[e] process of compromise and economic pressure [that characterizes collective bargaining]").

The rationale in *Schneider* and our other cases in this area thus precludes a holding that a benefit plan must primarily rely on union monitoring of an employer's compliance with its trust obligations.[19]

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[19] In *Schneider* we not only concluded that compelling benefit plan reliance on union enforcement of trust obligations would have significant costs to the protections of ERISA, but we also concluded that compelling such reliance would produce few benefits in terms of federal labor policies. For

(2)

There are also compelling reasons why the Department of Labor's power to police employer compliance must be rejected as an alternative to audits by the plans themselves. Indeed, the structure of ERISA makes clear that Congress did not intend for Government enforcement powers to lessen the responsibilities of plan fiduciaries.

First, the Department of Labor denies that it has the resources for policing the day-to-day operations of each multiemployer benefit plan in the Nation. The United States, as *amicus*, informs us that approximately 900,000 benefit plans file annual reports with the Secretary of Labor, and that between 11,000 and 12,000 of these are multiemployer plans. As the petitioners' situations illustrate, some multiemployer plans can be quite large. See n. 1, *supra*. It is therefore not surprising that the United States argues that "[i]t is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits." Brief for United States as *Amicus Curiae* 20, n. 11.

Second, although ERISA grants the Secretary of Labor broad investigatory powers, see, *e. g.*, 29 U. S. C. § 1134, neither the structure of the Act nor the legislative history shows any congressional intent that plans should rely primarily on centralized federal monitoring of employer contribution requirements. Indeed, Congress expressly withheld from the Secretary the authority to initiate actions to enforce an employer's contribution obligations. See 29 U. S. C. §§ 1132(b)(2), 1145. In contrast, as we have noted, trustees

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example, such policies as the presumption in favor of arbitrability derive in large part from the desire to promote alternatives to strikes, lockouts, and other exercises of economic power. But that goal has little relevance to the field of trust administration, where disputes between plans and participating employers do not normally have such results. 466 U. S., at 372, and n. 13.

were given the authority to sue to enforce an employer's obligations to a plan. § 1132.

B

The Court of Appeals also challenged Central States' need for the audit because of the likelihood that covered employees would themselves come forward to assure that employers are making required contributions on their behalf. The court emphasized that participants could become aware of their status through the Act's reporting provisions. 698 F. 2d, at 813 (citing 29 U. S. C. § 1021). But although the reporting requirements are designed to assure that participants receive information about their status and rights, they do so by placing a reporting duty *on the plans*. Thus, to give participants initial notice of their status, the plans need to know the identities of participants. See nn. 14, 15, *supra*, and accompanying text. That is, of course, precisely the information that Central States sought to verify in its requested audit.[20]

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[20] The Court of Appeals also questioned the importance of the audit's goal, speculating that the plan might simply be able to deny benefit claims of participants who had been notified of their status through the reporting requirement but had nevertheless taken no action to assure that their employers properly contributed on their behalf. 698 F. 2d, at 813. Obviously, this "estoppel argument" has the same flaw as the argument that a participant, once notified of his status, will come forward to identify himself: Before the plan can notify a participant of his status, it must have identified him, and such identification was the purpose of the requested audit.

In addition, however, the argument has other major problems. First, we note that the Labor Department has consistently taken the position that any pension plan document language denying benefits to a participant because of an employer's failure to make required contributions would violate ERISA and would thus be unenforceable. See n. 7, *supra*. At a minimum, this means that Central States is reasonable in operating its audit program under the assumption that it would be liable for pension claims regardless of an employer's failure to make required contributions. Second, the Court of Appeals did not contend that the reports Central States sends to participants inform them of a burden of verifying their

C

The Court of Appeals' remaining reason for questioning Central States' interest in the audit focused on the fact that a benefit plan would have an action against a delinquent employer should any benefit claims ever be made by a participant who had never been the subject of contributions. We reject the notion that the plan's ultimate ability to remedy an employer's breach of its obligations forecloses the plan from seeking to deter such breaches or to discover them early. Such a suggestion ignores the trustees' fiduciary duty to inform participants and beneficiaries of their rights, to gain immediate use of trust assets for the benefit of the trust, to avoid the time and expense of litigation, and to avoid unfunded liabilities that might eventually prove uncollectable as a result of insolvencies. For a plan passively to allow an employer to create such unfunded liabilities would jeopardize the participants' and beneficiaries' interests as well as those of all participating employers who properly comply with their obligations. See *Schneider*, 466 U. S., at 373, and n. 17.

The Court of Appeals' argument obviously conflicts with one of the principal congressional concerns motivating the passage of the Act, that plans should assure themselves of adequate funding by promptly collecting employer contributions.[21] In ERISA, Congress sought to create a pension system in which "[a]ll current accruals of benefits based on current service . . . [would] be paid for immediately." H. R. Rep. No. 93–533, p. 14 (1973). See generally 29 U. S. C. § 1082. As the Reports accompanying the bills declared:

> "The pension plan which offers full protection to its employees is one which is funded with accumulated assets which at least are equal to the accrued liabilities,

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employer's contributions, or that the plan documents deny benefits on the basis of an employer's failure to make proper contributions. Thus, even if ERISA allowed a plan to operate in one of these manners, there has been no finding that the plans at issue here have done so.

[21] See Part III–C, *supra*.

and with a contribution rate sufficient to maintain that status at all times." *Id.*, at 7; S. Rep. No. 93–127, pp. 9–10 (1973) (identical language).[22]

V

Given Congress' vision of the proper administration of employee benefit plans under ERISA, we have little difficulty holding that the audit requested by Central States is well within the authority of the trustees as outlined in the trust documents. But we should also specify what we do not hold. First, we do not hold that under ERISA a benefit plan's interests in fully identifying participants and beneficiaries *require* that it conduct the sort of audit in question. This case involves only the trustees' *right* to conduct this particular kind of audit program, not their *duty* to do so. Second, we have no occasion to determine whether ERISA would independently confer on the trustees a right to perform the sort of audit demanded in this case in the face of trust documents that explicitly limit the audit powers of trustees. Cf. 29

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[22] In the floor debate on the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96–364, 94 Stat. 1208, which amended ERISA to further protect the funding of multiemployer plans, one of the floor managers explained the problems some employers create for multiemployer plans by not fully and promptly complying with their contribution obligations:

"Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys' fees and other legal costs arise in connection with collection efforts.

"These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavier cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, . . . uncollected delinquencies can add to the unfunded liability for all employers." 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson).

U. S. C. § 1104(a)(1)(D). Last, we have no occasion in this case to analyze what sort of factual showing would be necessary to a claim that a particular auditing program was being conducted in a manner that violated ERISA's fiduciary duties of loyalty or care. Although we do not question the proposition that the auditing powers of a benefit plan are limited to prudent actions furthering the legitimate purposes of the plan, there is no reason in ERISA or the plan documents of this case why the kind of audit requested here should, as a matter of law, be considered outside the scope of proper plan administration.[23]

The judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

JUSTICE STEVENS, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, concurring in part and dissenting in part.

If an employer who participates in a multiemployer benefit plan enters into an agreement that authorizes the trustees of the plan to conduct an audit of the employer's personnel records, such an agreement is not prohibited by ERISA. That is the proposition of law that I understand the Court to announce today and I agree with it.

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[23] We note that in this case Central States has agreed to various limits on its audit so as not to exceed what would be reasonably appropriate for the service of the audit's legitimate purposes. See n. 5, *supra*. Central States does not dispute that its right to demand access to employer records does not reach beyond what is appropriate for the proper administration of the plans, and, of course, a court ordering an employer to comply with a particular audit demand could, upon a proper showing by the employer, limit the auditors accordingly. Cf. *Central States, Southeast and Southwest Areas Pension Fund* v. *Theut Products*, Civ. No. 82–71080 (ED Mich., Oct. 21, 1982) (Cohn, J.) (reprinted in App. to Pet. for Cert. A–96) (ordering an employer to comply with a benefit plan's audit request but allowing the employer to withhold specific information that was not relevant to the audit's purposes and allowing the employer to restrict the auditors' ability to copy or disclose information where the auditors' did not need to do so).

In my opinion, the right to conduct an audit of the kind involved in this case must be granted by contract; it is not conferred by ERISA itself. My disagreement with the Court is based on our differing interpretations of the particular contract documents in this case.

The Pension Fund trust agreements, as the Court accurately quotes, provide that "each Employer shall promptly furnish to the Trustees, upon reasonable demand" information concerning "its Employees." App. to Pet. for Cert. A–46. The term "Employees," however, the first letter of which is capitalized in the trust agreements, does not comprise *all* employees of respondents. Instead, Article I, § 3, expressly provides that "[t]he term 'Employee' as used herein shall include," in pertinent part, persons who are both employed pursuant to the collective-bargaining agreement *and* covered by the pension plan. *Id.*, at A–43.* Thus, the trustees have power to audit personnel records only of *covered* employees.

Nor do the trust agreements require this Court to acquiesce in the trustees' understandable assertion of power to investigate whatever personnel records they deem necessary. It is true that Article IV provides that interpretations of the trust agreements adopted by a majority of the trustees "in good faith shall be binding upon the Union, Employees and Employers." *Id.*, at A–48. But as the Court of Appeals pointed out, this broad language "does not . . . give the trustees *carte blanche* powers to undertake an audit of the records of all of [respondents'] employees. They are limited in their discretion by . . . the common law concept that a trustee may only act within the scope of his or her authority." 698 F. 2d 802, 810 (1983).

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*The general language italicized by the Court, *ante*, at 566, in context authorizes audits of records in addition to those specifically listed, but only as to *covered* employees. If the language were construed to encompass records of noncovered employees, the limitations in the preceding sentence of the trust agreements would be read out of the contract.

In sum, although I acknowledge that the provisions of those documents that the Court has quoted lend support to its conclusion, I find the painstaking and accurate analysis of the complete set of documents in Judge Kennedy's opinion for the Court of Appeals far more persuasive. See *id.*, at 806–810. Because the dispute over the meaning of these particular documents is not a matter of special public interest, I simply record my agreement with the Court of Appeals' interpretation of the contract. To that extent, I respectfully dissent.

ASPEN SKIING CO. *v.* ASPEN HIGHLANDS SKIING CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 84–510. Argued March 27, 1985—Decided June 19, 1985

Respondent, which owns one of the four major mountain facilities for downhill skiing at Aspen, Colo., filed a treble-damages action in Federal District Court in 1979 against petitioner, which owns the other three major facilities, alleging that petitioner had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act. The evidence showed that in earlier years, when there were only three major facilities operated by three independent companies (including both petitioner and respondent), each competitor offered both its own tickets for daily use of its mountain and an interchangeable 6-day all-Aspen ticket, which provided convenience to skiers who visited the resort for weekly periods but preferred to remain flexible about what mountain they might ski each day. Petitioner, upon acquiring its second of the three original facilities and upon opening the fourth, also offered, during most of the ski seasons, a weekly multiarea ticket covering only its mountains, but eventually the all-Aspen ticket outsold petitioner's own multiarea ticket. Over the years, the method for allocation of revenues from the all-Aspen ticket to the competitors developed into a system based on random-sample surveys to determine the number of skiers who used each mountain. However, for the 1977–1978 ski season, respondent, in order to secure petitioner's agreement to continue to sell all-Aspen tickets, was required to accept a fixed percentage of the ticket's revenues. When respondent refused to accept a lower percentage—considerably below its historical average based on usage—for the next season, petitioner discontinued its sale of the all-Aspen ticket; instead sold 6-day tickets featuring only its own mountains; and took additional actions that made it extremely difficult for respondent to market its own multiarea package to replace the joint offering. Respondent's share of the market declined steadily thereafter. The jury returned a verdict against petitioner, fixing respondent's actual damages, and the court entered a judgment for treble damages. The Court of Appeals affirmed, rejecting petitioner's contention that there cannot be a requirement of cooperation between competitors, even when one possesses monopoly powers.

Held:

1. Although even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor (and the jury was so instructed here), the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. *Lorain Journal Co.* v. *United States*, 342 U. S. 143. The question of intent is relevant to the offense of monopolization in determining whether the challenged conduct is fairly characterized as "exclusionary," "anticompetitive," or "predatory." In this case, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor, but instead elected to make an important change in a pattern of distribution of all-Aspen tickets that had originated in a competitive market and had persisted for several years. It must be assumed that the jury, as instructed by the trial court, drew a distinction "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other," and that the jury concluded that there were no "valid business reasons" for petitioner's refusal to deal with respondent. Pp. 600–605.

2. The evidence in the record, construed most favorably in support of respondent's position, is adequate to support the verdict under the instructions given. In determining whether petitioner's conduct may properly be characterized as exclusionary, it is appropriate to examine the effect of the challenged pattern of conduct on consumers, on respondent, and on petitioner itself. Pp. 605–611.

(a) The evidence showed that, over the years, skiers developed a strong demand for the all-Aspen ticket, and that they were adversely affected by its elimination. Pp. 605–607.

(b) The adverse impact of petitioner's pattern of conduct on respondent was established by evidence showing the extent of respondent's pecuniary injury, its unsuccessful attempt to protect itself from the loss of its share of the patrons of the all-Aspen ticket, and the steady decline of its share of the relevant market after the ticket was terminated. Pp. 607–608.

(c) The evidence relating to petitioner itself did not persuade the jury that its conduct was justified by any normal business purpose, but instead showed that petitioner sought to reduce competition in the market over the long run by harming its smaller competitor. That conclusion is strongly supported by petitioner's failure to offer any efficiency justification whatever for its pattern of conduct. Pp. 608–611.

738 F. 2d 1509, affirmed.

STEVENS, J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the decision of the case.

Richard M. Cooper argued the cause for petitioner. With him on the briefs were *Edward Bennett Williams, Harold Ungar, David G. Palmer,* and *William W. Maywhort.*

Tucker K. Trautman argued the cause for respondent. With him on the brief were *John H. Evans, Owen C. Rouse,* and *John H. Shenefield.**

JUSTICE STEVENS delivered the opinion of the Court.

In a private treble-damages action, the jury found that petitioner Aspen Skiing Company (Ski Co.) had monopolized the market for downhill skiing services in Aspen, Colorado. The question presented is whether that finding is erroneous as a matter of law because it rests on an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals in a marketing arrangement in order to avoid violating § 2 of the Sherman Act.[1]

I

Aspen is a destination ski resort with a reputation for "super powder," "a wide range of runs," and an "active night life," including "some of the best restaurants in North America." Tr. 765–767. Between 1945 and 1960, private investors independently developed three major facilities for downhill skiing: Aspen Mountain (Ajax),[2] Aspen Highlands

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**Robert E. Cooper* and *Theodore B. Olson* filed a brief for American Airlines, Inc., as *amicus curiae* urging reversal.

[1] The statute provides, in relevant part:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U. S. C. § 2.

[2] Ski Co. developed Ajax in 1946. The runs are quite steep and primarily designed for expert or advanced intermediate skiers. The base area of Ajax is located within the village of Aspen.

(Highlands),[3] and Buttermilk.[4] A fourth mountain, Snowmass,[5] opened in 1967.

The development of any major additional facilities is hindered by practical considerations and regulatory obstacles.[6] The identification of appropriate topographical conditions for a new site and substantial financing are both essential. Most of the terrain in the vicinity of Aspen that is suitable for downhill skiing cannot be used for that purpose without the approval of the United States Forest Service. That approval is contingent, in part, on environmental concerns. Moreover, the county government must also approve the

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[3] In 1957, the United States Forest Service suggested that Ajax "was getting crowded, and . . . that a ski area ought to be started at Highlands." Tr. 150. Whipple V. N. Jones, who owned an Aspen lodge at the time, discussed the project with Ski Co. officials, but they expressed little interest, telling him that they had "plenty of problems at Aspen now, and we don't think we want to expand skiing in Aspen." *Id.*, at 150–151. Jones went ahead with the project on his own, and laid out a well-balanced set of ski runs: 25% beginner, 50% intermediate, 25% advanced. The base area of Highlands Mountain is located 1½ miles from the village of Aspen. *Id.*, at 154. Respondent Aspen Highlands Skiing Corporation provides the downhill skiing services at Highlands Mountain. Throughout this opinion we refer to both the respondent and its mountain as Highlands.

[4] In 1958, Friedl Pfeiffer and Arthur Pfister began developing the ranches they owned at the base of Buttermilk Mountain into a third ski area. Pfeiffer, a former Olympian, was the director of the ski school for Ski Co., and the runs he laid out were primarily for beginners and intermediate skiers. More advanced runs have since been developed. The base area of Buttermilk is located approximately 2¼ miles from the village of Aspen. *Id.*, at 152, 1471–1472, 1526; Deposition of Paul Nitze 6–7.

[5] In the early 1960's William Janss, a former ski racer, and his associates had acquired three ranches in the Snowmass Valley, and had secured Forest Service permits for a ski area. The developer sold the company holding the permits to Ski Co. to allow it to develop a downhill skiing facility for the project, leaving him to develop the land at the base of the site. A fairly balanced mountain was developed with a mixture of beginner, intermediate, and advanced runs. *Id.*, at 14–16; Tr. 1475–1476. The base area of Snowmass is eight miles from the village of Aspen.

[6] *Id.*, at 378–379, 638, 2040–2051, 2069–2070, 2078–2082.

project, and in recent years it has followed a policy of limiting growth.

Between 1958 and 1964, three independent companies operated Ajax, Highlands, and Buttermilk. In the early years, each company offered its own day or half-day tickets for use of its mountain. *Id.*, at 152. In 1962, however, the three competitors also introduced an interchangeable ticket.[7] *Id.*, at 1634. The 6-day, all-Aspen ticket provided convenience to the vast majority of skiers who visited the resort for weekly periods, but preferred to remain flexible about what mountain they might ski each day during the visit. App. 92. It also emphasized the unusual variety in ski mountains available in Aspen.

As initially designed, the all-Aspen ticket program consisted of booklets containing six coupons, each redeemable for a daily lift ticket at Ajax, Highlands, or Buttermilk. The price of the booklet was often discounted from the price of six daily tickets, but all six coupons had to be used within a limited period of time—seven days, for example. The revenues from the sale of the 3-area coupon books were distributed in accordance with the number of coupons collected at each mountain. Tr. 153, 1634–1638.

In 1964, Buttermilk was purchased by Ski Co., but the interchangeable ticket program continued. In most seasons after it acquired Buttermilk, Ski Co. offered 2-area, 6- or 7-day tickets featuring Ajax and Buttermilk in competition with the 3-area, 6-coupon booklet. Although it sold briskly, the all-Aspen ticket did not sell as well as Ski Co.'s multiarea ticket until Ski Co. opened Snowmass in 1967. Thereafter,

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[7] Friedl Pfeiffer, one of the developers of Buttermilk, initiated the idea of an all-Aspen ticket at a luncheon with the owner of Highlands and the President of Ski Co. Pfeiffer, a native of Austria, informed his competitors that "'[i]n St. Anton, we have a mountain that has three different lift companies—lifts owned by three different lift companies. . . . We sell a ticket that is interchangeable.' It was good on any of those lifts; and he said, 'I think we should do the same thing here.'" *Id.*, at 153.

the all-Aspen coupon booklet began to outsell Ski Co.'s ticket featuring only its mountains. Record Ex. LL; Tr. 1646, 1675–1676.

In the 1971–1972 season, the coupon booklets were discontinued and an "around the neck" all-Aspen ticket was developed. This refinement on the interchangeable ticket was advantageous to the skier, who no longer found it necessary to visit the ticket window every morning before gaining access to the slopes. Lift operators at Highlands monitored usage of the ticket in the 1971–1972 season by recording the ticket numbers of persons going onto the slopes of that mountain. Highlands officials periodically met with Ski Co. officials to review the figures recorded at Highlands, and to distribute revenues based on that count. *Id.*, at 1622, 1639.

There was some concern that usage of the all-Aspen ticket should be monitored by a more scientific method than the one used in the 1971–1972 season. After a one-season absence, the 4-area ticket returned in the 1973–1974 season with a new method of allocating revenues based on usage. Like the 1971–1972 ticket, the 1973–1974 4-area ticket consisted of a badge worn around the skier's neck. Lift operators punched the ticket when the skier first sought access to the mountain each day. A random-sample survey was commissioned to determine how many skiers with the 4-area ticket used each mountain, and the parties allocated revenues from the ticket sales in accordance with the survey's results.

In the next four seasons, Ski Co. and Highlands used such surveys to allocate the revenues from the 4-area, 6-day ticket. Highlands' share of the revenues from the ticket was 17.5% in 1973–1974, 18.5% in 1974–1975, 16.8% in 1975–1976, and 13.2% in 1976–1977.[8] During these four seasons, Ski Co. did not offer its own 3-area, multiday ticket in compe-

[8] *Id.*, at 167. Highlands' share of the total market during those seasons, as measured in skier visits was 15.8% in 1973–1974, 17.1% in 1974–1975, 17.4% in 1975–1976, and 20.5% in 1976–1977. Record Ex. No. 97, App. 183.

tition with the all-Aspen ticket.[9] By 1977, multiarea tickets accounted for nearly 35% of the total market. *Id.*, at 614, 1367. Holders of multiarea passes also accounted for additional daily ticket sales to persons skiing with them.

Between 1962 and 1977, Ski Co. and Highlands had independently offered various mixes of 1-day, 3-day, and 6-day passes at their own mountains.[10] In every season except one, however, they had also offered some form of all-Aspen, 6-day ticket, and divided the revenues from those sales on the basis of usage. Nevertheless, for the 1977–1978 season, Ski Co. offered to continue the all-Aspen ticket only if Highlands would accept a 13.2% fixed share of the ticket's revenues.

Although that had been Highlands' share of the ticket revenues in 1976–1977, Highlands contended that that season was an inaccurate measure of its market performance since it had been marked by unfavorable weather and an unusually low number of visiting skiers.[11] Moreover, Highlands wanted to continue to divide revenues on the basis of actual usage, as that method of distribution allowed it to compete

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[9] In 1975, the Colorado Attorney General filed a complaint against Ski Co. and Highlands alleging, in part, that the negotiations over the 4-area ticket had provided them with a forum for price fixing in violation of § 1 of the Sherman Act and that they had attempted to monopolize the market for downhill skiing services in Aspen in violation of § 2. Record Ex. X. In 1977, the case was settled by a consent decree that permitted the parties to continue to offer the 4-area ticket provided that they set their own ticket prices unilaterally before negotiating its terms. Tr. 229–231.

[10] About 15–20% of each company's ticket revenues were derived from sales to tour operators at a wholesale discount of 10–15%, while 80–85% of the ticket revenues were derived from sales to skiers in Aspen. *Id.*, at 623, 1772.

[11] The 1976–1977 season was "a no snow year." There were less than half as many skier visits (529,800) in that season as in either 1975–1976 (1,238,500) or 1977–1978 (1,273,400). Record Ex. No. 97, App. 183. In addition, Highlands opened earlier than Ski Co.'s mountains and its patrons skied off all the good snow. Ski Co. waited until January and had a better base for the rest of the season. Tr. 228.

for the daily loyalties of the skiers who had purchased the tickets. Tr. 172. Fearing that the alternative might be no interchangeable ticket at all, and hoping to persuade Ski Co. to reinstate the usage division of revenues, Highlands eventually accepted a fixed percentage of 15% for the 1977–1978 season. *Ibid.* No survey was made during that season of actual usage of the 4-area ticket at the two competitors' mountains.

In the 1970's the management of Ski Co. increasingly expressed their dislike for the all-Aspen ticket. They complained that a coupon method of monitoring usage was administratively cumbersome. They doubted the accuracy of the survey and decried the "appearance, deportment, [and] attitude" of the college students who were conducting it. *Id.*, at 1627. See also *id.*, at 398, 405–407, 959. In addition, Ski Co.'s president had expressed the view that the 4-area ticket was siphoning off revenues that could be recaptured by Ski Co. if the ticket was discontinued. *Id.*, at 586–587, 950, 960. In fact, Ski Co. had reinstated its 3-area, 6-day ticket during the 1977–1978 season, but that ticket had been outsold by the 4-area, 6-day ticket nearly two to one. *Id.*, at 613–614.

In March 1978, the Ski Co. management recommended to the board of directors that the 4-area ticket be discontinued for the 1978–1979 season. The board decided to offer Highlands a 4-area ticket provided that Highlands would agree to receive a 12.5% fixed percentage of the revenue—considerably below Highlands' historical average based on usage. *Id.*, at 396, 585–586. Later in the 1978–1979 season, a member of Ski Co.'s board of directors candidly informed a Highlands official that he had advocated making Highlands "an offer that [it] could not accept." *Id.*, at 361.

Finding the proposal unacceptable, Highlands suggested a distribution of the revenues based on usage to be monitored by coupons, electronic counting, or random sample surveys. *Id.*, at 188. If Ski Co. was concerned about who was to conduct the survey, Highlands proposed to hire disinterested

ticket counters at its own expense—"somebody like Price Waterhouse"—to count or survey usage of the 4-area ticket at Highlands. *Id.*, at 191. Ski Co. refused to consider any counterproposals, and Highlands finally rejected the offer of the fixed percentage.

As far as Ski Co. was concerned, the all-Aspen ticket was dead. In its place Ski Co. offered the 3-area, 6-day ticket featuring only its mountains. In an effort to promote this ticket, Ski Co. embarked on a national advertising campaign that strongly implied to people who were unfamiliar with Aspen that Ajax, Buttermilk, and Snowmass were the only ski mountains in the area. For example, Ski Co. had a sign changed in the Aspen Airways waiting room at Stapleton Airport in Denver. The old sign had a picture of the four mountains in Aspen touting "Four Big Mountains" whereas the new sign retained the picture but referred only to three. *Id.*, at 844, 847, 858–859.[12]

Ski Co. took additional actions that made it extremely difficult for Highlands to market its own multiarea package to replace the joint offering. Ski Co. discontinued the 3-day, 3-area pass for the 1978–1979 season,[13] and also refused to sell Highlands any lift tickets, either at the tour operator's discount or at retail. *Id.*, at 327.[14] Highlands finally developed

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[12] Ski Co. circulated another advertisement to national magazines labeled "Aspen, More Mountains, More Fun." App. 184. The advertisement depicted the four mountains of Aspen, but labeled only Ajax, Buttermilk, and Snowmass. Buttermilk's label is erroneously placed directly over Highlands Mountain. Tr. 860, 1803.

[13] Highlands' owner explained that there was a key difference between the 3-day, 3-area ticket and the 6-day, 3-area ticket: "with the three day ticket, a person could ski on the . . . Aspen Skiing Corporation mountains for three days and then there would be three days in which he could ski on our mountain; but with the six-day ticket, we are absolutely locked out of those people." *Id.*, at 245. As a result of "tremendous consumer demand" for a 3-day ticket, Ski Co. reinstated it late in the 1978–1979 season, but without publicity or a discount off the daily rate. *Id.*, at 622.

[14] In the 1977–1978 negotiations, Ski Co. previously had refused to consider the sale of any tickets to Highlands, noting that it was "obviously not

an alternative product, the "Adventure Pack," which consisted of a 3-day pass at Highlands and three vouchers, each equal to the price of a daily lift ticket at a Ski Co. mountain. The vouchers were guaranteed by funds on deposit in an Aspen bank, and were redeemed by Aspen merchants at full value. *Id.*, at 329–334. Ski Co., however, refused to accept them.

Later, Highlands redesigned the Adventure Pack to contain American Express Traveler's Checks or money orders instead of vouchers. Ski Co. eventually accepted these negotiable instruments in exchange for daily lift tickets.[15] *Id.*, at 505, 507, 549. Despite some strengths of the product, the Adventure Pack met considerable resistance from tour operators and consumers who had grown accustomed to the convenience and flexibility provided by the all-Aspen ticket. *Id.*, at 784–785, 1041.

Without a convenient all-Aspen ticket, Highlands basically "becomes a day ski area in a destination resort." *Id.*, at 1425. Highlands' share of the market for downhill skiing services in Aspen declined steadily after the 4-area ticket based on usage was abolished in 1977: from 20.5% in 1976–1977, to 15.7% in 1977–1978, to 13.1% in 1978–1979, to

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interested in helping sell" a package competitive with the 3-area ticket. Record Ex. No. 16; Tr. 269–270. Later, in the 1978–1979 negotiations, Ski Co.'s vice president of finance told a Highlands official that "[w]e will not have anything to do with a four-area ticket sponsored by the Aspen Highlands Skiing Corporation." *Id.*, at 335. When the Highlands official inquired why Ski Co. was taking this position considering that Highlands was willing to pay full retail value for the daily lift tickets, the Ski Co. official answered tersely: "we will not support our competition." *Ibid.*

[15] Of course, there was nothing to identify Highlands as the source of these instruments, unless someone saw the skier "taking it out of an Adventure Pack envelope." *Id.*, at 505. For the 1981–1982 season, Ski Co. set its single ticket price at $22 and discounted the 3-area, 6-day ticket to $114. According to Highlands, this price structure made the Adventure Pack unprofitable. *Id.*, at 535.

12.5% in 1979–1980, to 11% in 1980–1981.[16] Record Ex. No. 97, App. 183. Highlands' revenues from associated skiing services like the ski school, ski rentals, amateur racing events, and restaurant facilities declined sharply as well.[17]

II

In 1979, Highlands filed a complaint in the United States District Court for the District of Colorado naming Ski Co. as a defendant. Among various claims,[18] the complaint alleged that Ski Co. had monopolized the market for downhill skiing services at Aspen in violation of § 2 of the Sherman Act, and prayed for treble damages. The case was tried to a jury which rendered a verdict finding Ski Co. guilty of the § 2 violation and calculating Highlands' actual damages at $2.5 million. App. 187–190.

In her instructions to the jury, the District Judge explained that the offense of monopolization under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market, and (2) the willful acquisition, maintenance, or use of that power by anticompetitive or exclusionary means or for anticompetitive or exclusionary

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[16] In these seasons, Buttermilk Mountain, in particular, substantially increased its market share at the expense of Highlands. Record Ex. BB; Tr. 1806.

[17] See Record Ex. No. 91; Tr. 488, 571–572, 692–694, 698, 701–702. Highlands' ski school had an outstanding reputation, and its share of the ski school market had always outperformed Highlands' share of the downhill skiing market. *Id.*, at 1822. Even some Ski Co. officials had sent their children to ski school at Highlands. *Id.*, at 560–570, 588. After the elimination of the 4-area ticket, however, families or groups purchasing 3-area tickets were reluctant to enroll a beginner among them in the Highlands ski school when the more experienced skiers would have to leave to ski at Ajax, Buttermilk, or Snowmass. *Id.*, at 571.

[18] Highlands also alleged that Ski Co. had conspired with various third parties in violation of § 1 of the Sherman Act. The District Court allowed this claim to go to the jury which rendered a verdict in Ski Co.'s favor. App. 189.

purposes.[19] Tr. 2310. Although the first element was vigorously disputed at the trial and in the Court of Appeals, in this Court Ski Co. does not challenge the jury's special verdict finding that it possessed monopoly power.[20] Nor does Ski Co. criticize the trial court's instructions to the jury concerning the second element of the § 2 offense.

On this element, the jury was instructed that it had to consider whether "Aspen Skiing Corporation willfully acquired, maintained, or used that power by anti-competitive or exclusionary means or for anti-competitive or exclusionary purposes." App. 181. The instructions elaborated:

> "In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other. The line between legitimately gained monopoly, its proper use and maintenance, and improper conduct has been described in various ways. It has been said that obtaining or maintaining monopoly power cannot represent monopolization if the power was gained and maintained by conduct that was honestly industrial. Or it is said that monopoly power which is thrust upon a firm due to its

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[19] In *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966), we explained:

"The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

[20] The jury found that the relevant product market was "[d]ownhill skiing at destination ski resorts," that the "Aspen area" was a relevant geographic submarket, and that during the years 1977–1981, Ski Co. possessed monopoly power, defined as the power to control prices in the relevant market or to exclude competitors. See App. 187–188.

superior business ability and efficiency does not constitute monopolization.

"For example, a firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing a large and efficient factory. These benefits are a consequence of size and not an exercise of monopoly power. Nor is a corporation which possesses monopoly power under a duty to cooperate with its business rivals. Also a company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal.

"In other words, if there were legitimate business reasons for the refusal, then the defendant, even if he is found to possess monopoly power in a relevant market, has not violated the law. We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.

"To sum up, you must determine whether Aspen Skiing Corporation gained, maintained, or used monopoly power in a relevant market by arrangements and policies which rather than being a consequence of a superior product, superior business sense, or historic element, were designed primarily to further any domination of the relevant market or sub-market." *Id.*, at 181–182.

The jury answered a specific interrogatory finding the second element of the offense as defined in these instructions.[21]

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[21] It answered this interrogatory affirmatively:

"Willful Acquisition, Maintenance or Use of Monopoly Power: Do you find by a preponderance of the evidence that the defendants willfully

Ski Co. filed a motion for judgment notwithstanding the verdict, contending that the evidence was insufficient to support a § 2 violation as a matter of law. In support of that motion, Ski Co. incorporated the arguments that it had advanced in support of its motion for a directed verdict, at which time it had primarily contested the sufficiency of the evidence on the issue of monopoly power. Counsel had, however, in the course of the argument at that time, stated: "Now, we also think, Judge, that there clearly cannot be a requirement of cooperation between competitors." Tr. 1452.[22] The District Court denied Ski Co.'s motion and entered a judgment awarding Highlands treble damages of $7,500,000, costs, and attorney's fees.[23] App. 191–192.

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acquired, maintained or used monopoly power by anticompetitive or exclusionary means or for anticompetitive or exclusionary purposes, rather than primarily as a consequence of a superior product, superior business sense, or historic accident?" *Id.*, at 189.

[22] Counsel also appears to have argued that Ski Co. was under a legal obligation to refuse to participate in any joint marketing arrangement with Highlands:

"Aspen Skiing Corporation is required to compete. It is required to make independent decisions. It is required to price its own product. It is required to make its own determination of the ticket that it chooses to offer and the tickets that it chooses not to offer." Tr. 1454.

In this Court, Ski Co. does not question the validity of the joint marketing arrangement under § 1 of the Sherman Act. Thus, we have no occasion to consider the circumstances that might permit such combinations in the skiing industry. See generally *National Collegiate Athletic Assn.* v. *Board of Regents of Univ. of Okla.*, 468 U. S. 85, 113–115 (1984); *Broadcast Music, Inc.*, v. *Columbia Broadcasting System, Inc.*, 441 U. S. 1, 18–23 (1979); *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36, 51–57 (1977).

[23] The District Court also entered an injunction requiring the parties to offer jointly a 4-area, 6-out-of-7-day coupon booklet substantially identical to the "Ski the Summit" booklet accepted by Ski Co. at its Breckenridge resort in Summit County, Colorado. See n. 30, *infra*. See also *supra*, at 589. The injunction was initially for a 3-year period, but was later extended through the 1984–1985 season by stipulation of the parties. Highlands represents that "it will not seek an extension of the injunction." Brief for Respondent 1, n. 1. No question is raised concerning the character of the injunctive relief ordered by the District Court.

The Court of Appeals affirmed in all respects. 738 F. 2d 1509 (CA10 1984). The court advanced two reasons for rejecting Ski Co.'s argument that "'there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in.'"[24] First, relying on *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383 (1912), the Court of Appeals held that the multiday, multiarea ticket could be characterized as an "essential facility" that Ski Co. had a duty to market jointly with Highlands. 738 F. 2d, at 1520–1521. Second, it held that there was sufficient evidence to support a finding that Ski Co.'s intent in refusing to market the 4-area ticket, "considered together with its other conduct," was to create or maintain a monopoly. *Id.*, at 1522.

In its review of the evidence on the question of intent, the Court of Appeals considered the record "as a whole" and concluded that it was not necessary for Highlands to prove that each allegedly anticompetitive act was itself sufficient to demonstrate an abuse of monopoly power. *Id.*, at 1522, n. 18.[25] The court noted that by "refusing to cooperate" with Highlands, Ski Co. "became the only business in Aspen that could offer a multi-day multi-mountain skiing experience"; that the refusal to offer a 4-mountain ticket resulted in "skiers' frustration over its unavailability"; that there was apparently no valid business reason for refusing to accept the coupons in Highlands' Adventure Pack; and that after Highlands had modified its Adventure Pack to meet Ski Co.'s objections, Ski Co. had increased its single ticket price to $22 "thereby making it unprofitable . . . to market [the] Adventure Pack." *Id.*, at 1521–1522. In reviewing Ski Co.'s argument that it was entitled to a directed verdict, the Court of Appeals assumed that the jury had resolved all contested questions of fact in Highlands' favor.

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[24] 738 F. 2d, at 1516–1517 (quoting Ski Co.'s brief below).

[25] See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962); *Associated Press* v. *United States*, 326 U. S. 1, 14 (1945).

III

In this Court, Ski Co. contends that even a firm with monopoly power has no duty to engage in joint marketing with a competitor, that a violation of § 2 cannot be established without evidence of substantial exclusionary conduct, and that none of its activities can be characterized as exclusionary. It also contends that the Court of Appeals incorrectly relied on the "essential facilities" doctrine and that an "anticompetitive intent" does not transform nonexclusionary conduct into monopolization. In response, Highlands submits that, given the evidence in the record, it is not necessary to rely on the "essential facilities" doctrine in order to affirm the judgment.[26] Tr. of Oral Arg. 34.

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors." *United States* v. *Citizens & Southern National Bank*, 422 U. S. 86, 116 (1975). Ski Co., therefore, is surely correct in submitting that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor. Ski Co. is quite wrong, however, in suggesting that the judgment in this case rests on any such proposition of law. For the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals. *Supra*, at 596–597.

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[26] Highlands also contends that Ski Co.'s present contentions were not properly raised in the District Court. In that court, Ski Co. primarily questioned whether the evidence supported a finding that it possessed monopoly power in a properly defined market. In this Court, on the other hand, Ski Co.'s entire argument relates to the question whether it misused that power. Nevertheless, we agree with the Court of Appeals' conclusion, 738 F. 2d, at 1517–1518, that Ski Co.'s motion for a directed verdict did raise the question whether the judgment improperly rested on an assumption that § 2 required a monopolist to cooperate with its rivals.

The absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.[27]

In *Lorain Journal Co.* v. *United States*, 342 U. S. 143 (1951), we squarely held that this right was not unqualified. Between 1933 and 1948 the publisher of the Lorain Journal, a newspaper, was the only local business disseminating news and advertising in that Ohio town. In 1948, a small radio station was established in a nearby community. In an effort to destroy its small competitor, and thereby regain its "pre-1948 substantial monopoly over the mass dissemination of all news and advertising," the Journal refused to sell advertising to persons that patronized the radio station. *Id.*, at 153.

In holding that this conduct violated § 2 of the Sherman Act, the Court dispatched the same argument raised by the monopolist here:

> "The publisher claims a right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases. We do not dispute that general right. 'But the word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' *Ameri-*

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[27] Under § 1 of the Sherman Act, a business "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752, 761 (1984); *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919).

> *can Bank & Trust Co.* v. *Federal Bank*, 256 U. S. 350, 358. The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. '*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' (Emphasis supplied.) *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. See *Associated Press* v. *United States*, 326 U. S. 1, 15; *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 721–723." 342 U. S., at 155.

The Court approved the entry of an injunction ordering the Journal to print the advertisements of the customers of its small competitor.

In *Lorain Journal*, the violation of § 2 was an "attempt to monopolize," rather than monopolization, but the question of intent is relevant to both offenses. In the former case it is necessary to prove a "specific intent" to accomplish the forbidden objective—as Judge Hand explained, "an intent which goes beyond the mere intent to do the act." *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 432 (CA2 1945). In the latter case evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as "exclusionary" or "anticompetitive"—to use the words in the trial court's instructions—or "predatory," to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that "no monopolist monopolizes unconscious of what he is doing."[28] As Judge

[28] "In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific,' intent, makes nonsense of it, for no monopolist

Bork stated more recently: "Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."[29]

The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. *Supra*, at 589, and n. 7. It continued to provide a desirable option for skiers when the market was enlarged to include four mountains, and when the character of the market was changed by Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multimountain areas which apparently are competitive,[30] it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets.

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monopolizes unconscious of what he is doing. So here, 'Alcoa' meant to keep, and did keep, that complete and exclusive hold upon the ingot market with which it started. That was to 'monopolize' that market, however innocently it otherwise proceeded." *United States* v. *Aluminum Co. of America*, 148 F. 2d, at 432.

[29] R. Bork, The Antitrust Paradox 160 (1978) (hereinafter Bork).

[30] Ski Co. itself participates in interchangeable ticket programs in at least two other markets. For example, since 1970, Ski Co. has operated the Breckenridge resort in Summit County, Colorado. Breckenridge participates in the "Ski the Summit" 4-area interchangeable coupon booklet which allows the skier to ski at any of the four mountains in the region: Breckenridge, Copper Mountain, Keystone, and Arapahoe Basin. Tr. 188, 590, 966, 1070–1081. In the 1979–1980 season Keystone and Arapahoe Basin—which are jointly operated—had about 40% of the Summit County market, and the other two ski mountains each had a market share of about

Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market.[31] Such a decision is not necessarily anticompetitive, and Ski Co. contends that neither its decision, nor the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary in this case. It recognizes, however, that as the case is presented to us, we must interpret the entire record in the light most favorable to Highlands and give to it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696 (1962).

Moreover, we must assume that the jury followed the court's instructions. The jury must, therefore, have drawn a distinction "between practices which tend to exclude or restrict competition on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other." *Supra*, at 596. Since the jury was unambiguously instructed that Ski Co.'s refusal to

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30%. *Id.*, at 1100. During the relevant period of time, Ski Co. also operated Blackcomb Mountain, northeast of Vancouver, British Columbia, which has an interchangeable ticket arrangement with nearby Whistler Mountain, an independently operated facility. *Id.*, at 369, 873–874. Interchangeable lift tickets apparently are also available in some European skiing areas. See n. 7, *supra*; Tr. 720.

[31] "In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs." Bork 156.

In § 1 cases where this Court has applied the *per se* approach to invalidity to concerted refusals to deal, "the boycott often cut off access to a supply, facility or market necessary to enable the boycotted firm to compete, . . . and frequently the boycotting firms possessed a dominant position in the relevant market." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, *ante*, at 294.

deal with Highlands "does not violate Section 2 if valid business reasons exist for that refusal," *supra*, at 597, we must assume that the jury concluded that there were no valid business reasons for the refusal. The question then is whether that conclusion finds support in the record.

IV

The question whether Ski Co.'s conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.[32] If a firm has been "attempting to exclude rivals on some basis other than efficiency,"[33] it is fair to characterize its behavior as predatory. It is, accordingly, appropriate to examine the effect of the challenged pattern of conduct on consumers, on Ski Co.'s smaller rival, and on Ski Co. itself.

Superior Quality of the All-Aspen Ticket

The average Aspen visitor "is a well-educated, relatively affluent, experienced skier who has skied a number of times in the past . . . ." Tr. 764. Over 80% of the skiers visiting the resort each year have been there before—40% of these repeat visitors have skied Aspen at least five times. *Id.*, at 768. Over the years, they developed a strong demand for the 6-day, all-Aspen ticket in its various refinements. Most experienced skiers quite logically prefer to purchase their tickets at once for the whole period that they will spend at the resort; they can then spend more time on the slopes and enjoying après-ski amenities and less time standing in ticket lines. The 4-area attribute of the ticket allowed the skier to

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[32] "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

[33] Bork 138.

purchase his 6-day ticket in advance while reserving the right to decide in his own time and for his own reasons which mountain he would ski on each day. It provided convenience and flexibility, and expanded the vistas and the number of challenging runs available to him during the week's vacation.[34]

While the 3-area, 6-day ticket offered by Ski Co. possessed some of these attributes, the evidence supports a conclusion that consumers were adversely affected by the elimination of the 4-area ticket. In the first place, the actual record of competition between a 3-area ticket and the all-Aspen ticket in the years after 1967 indicated that skiers demonstrably preferred four mountains to three. *Supra*, at 589–590, 592. Highlands' expert marketing witness testified that many of the skiers who come to Aspen want to ski the four mountains, and the abolition of the 4-area pass made it more difficult to satisfy that ambition. Tr. 775. A consumer survey undertaken in the 1979–1980 season indicated that 53.7% of the respondents wanted to ski Highlands, but would not; 39.9% said that they would not be skiing at the mountain of their choice because their ticket would not permit it. Record Ex. No. 75, pp. 36–37.

Expert testimony and anecdotal evidence supported these statistical measures of consumer preference. A major whole-

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[34] Highlands' expert marketing witness testified that visitors to the Aspen resort "are looking for a variety of skiing experiences, partly because they are going to be there for a week and they are going to get bored if they ski in one area for very long; and also they come with people of varying skills. They need some variety of slopes so that if they want to go out and ski the difficult areas, their spouses or their buddies who are just starting out skiing can go on the bunny hill or the not-so-difficult slopes." Tr. 765. The owner of a condominium management company added: "The guest is coming for a first-class destination ski experience, and part of that, I think, is the expectation of perhaps having available to him the ability to ski all of what is there; *i. e.*, four mountains vs. three mountains. It helps enhance the quality of the vacation experience." *Id.*, at 720. See also *id.*, at 685.

sale tour operator asserted that he would not even consider marketing a 3-area ticket if a 4-area ticket were available.[35] During the 1977–1978 and 1978–1979 seasons, people with Ski Co.'s 3-area ticket came to Highlands "on a very regular basis" and attempted to board the lifts or join the ski school.[36] Highlands officials were left to explain to angry skiers that they could only ski at Highlands or join its ski school by paying for a 1-day lift ticket. Even for the affluent, this was an irritating situation because it left the skier the option of either wasting 1 day of the 6-day, 3-area pass or obtaining a refund which could take all morning and entailed the forfeit of the 6-day discount.[37] An active officer in the Atlanta Ski Club testified that the elimination of the 4-area pass "infuriated" him. Tr. 978.

Highlands' Ability to Compete

The adverse impact of Ski Co.'s pattern of conduct on Highlands is not disputed in this Court. Expert testimony described the extent of its pecuniary injury. The evidence concerning its attempt to develop a substitute product either by buying Ski Co.'s daily tickets in bulk, or by marketing its

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[35] "Our philosophy is that . . . to offer [Aspen] as a premier ski resort, our clients should be offered all of the terrain. Therefore, we would never consciously consider offering a three-mountain ticket if there were a four-mountain ticket available." *Id.*, at 1026.

[36] *Id.*, at 356, 492, 572, 679, 1001–1002. For example, the marketing director of Highlands' ski school reported that one frustrated consumer was a dentist from "the Des Moines area [who] came out with two of his children, and he had been told by our base lift operator that he could not board. He became somewhat irate and she had referred him to my office, which is right there on the ski slopes. He came into my office and started out, 'Well, I want to go skiing here, and I don't understand why I can't.' When we got the situation slowed down and explained that there were two different tickets, well, what came out is irritation occurred because he had intended when he came to Aspen to be able to ski all areas . . . ." *Id.*, at 356.

[37] The refund policy was cumbersome, and poorly publicized. *Id.*, at 994, 1044, 1053.

own Adventure Pack, demonstrates that it tried to protect itself from the loss of its share of the patrons of the all-Aspen ticket. The development of a new distribution system for providing the experience that skiers had learned to expect in Aspen proved to be prohibitively expensive. As a result, Highlands' share of the relevant market steadily declined after the 4-area ticket was terminated. The size of the damages award also confirms the substantial character of the effect of Ski Co.'s conduct upon Highlands.[38]

Ski Co.'s Business Justification

Perhaps most significant, however, is the evidence relating to Ski Co. itself, for Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose. Ski Co. was apparently willing to forgo daily ticket sales both to skiers who sought to exchange the coupons contained in Highlands' Adventure Pack, and to those who would have purchased Ski Co. daily lift tickets from Highlands if Highlands had been permitted to purchase them in bulk. The jury may well have concluded that Ski Co. elected to forgo these short-run benefits because it was more interested in reducing competition in the Aspen market over the long run by harming its smaller competitor.

That conclusion is strongly supported by Ski Co.'s failure to offer any efficiency justification whatever for its pattern of conduct.[39] In defending the decision to terminate the jointly

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[38] In considering the competitive effect of Ski Co.'s refusal to deal or cooperate with Highlands, it is not irrelevant to note that similar conduct carried out by the concerted action of three independent rivals with a similar share of the market would constitute a *per se* violation of § 1 of the Sherman Act. See *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, *ante*, at 294. Cf. *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 154 (1951).

[39] "The law can usefully attack this form of predation only when there is evidence of specific intent to drive others from the market by means other than superior efficiency and when the predator has overwhelming market size, perhaps 80 or 90 percent. Proof of specific intent to engage in preda-

offered ticket, Ski Co. claimed that usage could not be properly monitored. The evidence, however, established that Ski Co. itself monitored the use of the 3-area passes based on a count taken by lift operators, and distributed the revenues among its mountains on that basis.[40] Ski Co. contended that coupons were administratively cumbersome, and that the survey takers had been disruptive and their work inaccurate. Coupons, however, were no more burdensome than the credit cards accepted at Ski Co. ticket windows. Tr. 330–331. Moreover, in other markets Ski Co. itself participated in interchangeable lift tickets using coupons, n. 30, *supra*. As for the survey, its own manager testified that the problems were much overemphasized by Ski Co. officials, and were mostly resolved as they arose. Tr. 663–667, 673. Ski Co.'s explanation for the rejection of Highlands' offer to hire—at its own expense—a reputable national accounting firm to audit usage of the 4-area tickets at Highlands' mountain, was that there was no way to "control" the audit. *Id.*, at 598.

In the end, Ski Co. was pressed to justify its pattern of conduct on a desire to disassociate itself from—what it con-

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tion may be in the form of statements made by the officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or *evidence that the conduct was not related to any apparent efficiency*. These matters are not so difficult of proof as to render the test overly hard to meet." Bork 157 (emphasis added).

[40] Under the Ski Co. system, each skier's ticket, whether a daily or weekly ticket, is punched before he goes out on the slopes for the day. Revenues are distributed between the mountains on the basis of this count. Tr. 650–651. Ski Co.'s vice president for finance testified that Ski Co. "would never consider" a system like that for monitoring usage on a 4-area ticket: "it's fine to approximate within your own company." *Id.*, at 599. The United States Forest Service, however, required the submission of financial information on a mountain-by-mountain basis as a condition of the permits issued for each mountain. *Id.*, at 643, 945. A lift operator at Ajax conceded that the survey count during the years of the 4-area ticket was "generally pretty close" to the count made by Ski Co.'s staff. *Id.*, at 1627.

sidered—the inferior skiing services offered at Highlands. *Id.*, at 401, 422. The all-Aspen ticket based on usage, however, allowed consumers to make their own choice on these matters of quality. Ski Co.'s purported concern for the relative quality of Highlands' product was supported in the record by little more than vague insinuations, and was sharply contested by numerous witnesses. Moreover, Ski Co. admitted that it was willing to associate with what it considered to be inferior products in other markets. *Id.*, at 964.

Although Ski Co.'s pattern of conduct may not have been as "'bold, relentless, and predatory'" as the publisher's actions in *Lorain Journal*,[41] the record in this case comfortably supports an inference that the monopolist made a deliberate effort to discourage its customers from doing business with its smaller rival. The sale of its 3-area, 6-day ticket, particularly when it was discounted below the daily ticket price, deterred the ticket holders from skiing at Highlands.[42] The refusal to accept the Adventure Pack coupons in exchange for daily tickets was apparently motivated entirely by a decision to avoid providing any benefit to Highlands even though accepting the coupons would have entailed no cost to Ski Co. itself, would have provided it with immediate benefits, and would have satisfied its potential customers. Thus the evidence supports an inference that Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice

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[41] *Lorain Journal Co.* v. *United States*, 342 U. S., at 149 (quoting opinion below, 92 F. Supp. 794, 796 (ND Ohio 1950)).

[42] "[W]hy didn't they buy an individual daily lift ticket at Aspen Highlands? . . . For those who had bought six-day tickets, I think despite the fact that they are all relatively affluent—a lot of them are relatively affluent when they go to Aspen—they are all sort of managerial types and they seem to be pretty cautious. Certainly the comments that I have had from individual skiers and from the tour operators, club people that I have talked to—they are pretty careful with their money and they would feel—these are the people who will buy the six-day, three-area ticket that giving up one of those days and going over to ski at Aspen Highlands would mean spending extra money." Tr. 777.

short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival.[43]

Because we are satisfied that the evidence in the record,[44] construed most favorably in support of Highlands' position, is adequate to support the verdict under the instructions given by the trial court, the judgment of the Court of Appeals is

Affirmed.

JUSTICE WHITE took no part in the decision of this case.

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[43] The Ski Co. advertising that conveyed the impression that there were only three skiing mountains in Aspen, *supra*, at 593, and n. 12, is consistent with this conclusion, even though this evidence would not be sufficient in itself to sustain the judgment.

[44] Given our conclusion that the evidence amply supports the verdict under the instructions as given by the trial court, we find it unnecessary to consider the possible relevance of the "essential facilities" doctrine, or the somewhat hypothetical question whether nonexclusionary conduct could ever constitute an abuse of monopoly power if motivated by an anticompetitive purpose. If, as we have assumed, no monopolist monopolizes unconscious of what he is doing, that case is unlikely to arise.

HOOPER ET AL. *v.* BERNALILLO COUNTY ASSESSOR

APPEAL FROM THE COURT OF APPEALS OF NEW MEXICO

No. 84–231. Argued February 20, 1985—Decided June 24, 1985

A New Mexico statute exempts from the State's property tax $2,000 of the taxable value of property of honorably discharged veterans who served on active duty during the Vietnam War for at least 90 continuous days, but limits the exemption to veterans who were New Mexico residents before May 8, 1976. Appellants, an otherwise qualified Vietnam veteran and his wife, established residence in New Mexico in 1981 and applied for the tax exemption for the 1983 tax year with respect to their jointly held real property in Bernalillo County. Appellee County Assessor denied the claim because of the residence requirement, and the County Valuation Board upheld the denial, rejecting appellants' contention that the residence requirement violated their Fourteenth Amendment right to equal protection of the law. The New Mexico Court of Appeals affirmed.

Held: The New Mexico statute's residence requirement violates the guarantees of the Equal Protection Clause. Pp. 616–624.

(a) By dividing resident Vietnam veterans into two groups, based on whether they were residents before May 8, 1976, the statute creates a fixed permanent distinction between classes of concededly bona fide residents. When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause. Under the minimum-rationality test, a law will survive scrutiny if the distinction rationally furthers a legitimate state purpose. Pp. 616–618.

(b) The distinction New Mexico makes between veterans who established residence before May 8, 1976, and those veterans who arrived in the State thereafter bears no rational relationship to the State's asserted objective of encouraging Vietnam veterans to move to New Mexico. The legislature did not set the eligibility date until 1983, long after the triggering event occurred, and thus cannot plausibly encourage veterans to move to the State by passing such retroactive legislation. Pp. 619–620.

(c) With regard to the asserted purpose of the statute to reward veterans who resided in the State before May 8, 1976, for their military service, the component of compensating veterans for past contributions is plainly legitimate. Consistent with this policy, a state may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor an irrational distinction among its residents. The New Mexico statute, however, confers a benefit only on "established" resident veterans—those who resided in the State before May 8,

1976—and the State seeks to justify this distinction on the basis that those veterans who left their homes in New Mexico to fight in Vietnam, as well as those who settled in the State within the few years after the war ended, deserve to be treated differently from veterans who establish New Mexico residence after May 8, 1976. Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence, the New Mexico statute's distinction as between two categories of resident veterans is not rationally related to the State's asserted legislative goal. Pp. 620–622.

(d) The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for their "past contributions" toward the Nation's military effort in Vietnam. Such an objective is not a legitimate state purpose. *Zobel* v. *Williams*, 457 U. S. 55. The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976. Pp. 622–623.

(e) This Court will not rule on the severability of the unconstitutional residence requirement from the balance of the New Mexico veterans' tax-exemption statute. It is for the New Mexico courts to decide, as a matter of state law, whether the legislature would have enacted the statute without the invalid portion. Pp. 623–624.

101 N. M. 172, 679 P. 2d 840, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, *post*, p. 624. STEVENS, J., filed a dissenting opinion, in which REHNQUIST and O'CONNOR, JJ., joined, *post*, p. 624. POWELL, J., took no part in the decision of the case.

Alvin D. Hooper, pro se, argued the cause for appellants. With him on the briefs was *Harold L. Folley*.

H. Bartow Farr III argued the cause for appellee. With him on the brief was *Kenneth Hunt*.*

**David Greer* filed a brief for the American Legion et al. as *amici curiae* urging affirmance.

Paul Bardacke, Attorney General, and *Bridget A. Jacober*, Special Assistant Attorney General, filed a brief for the State of New Mexico as *amicus curiae*.

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide whether a New Mexico statute that grants a tax exemption limited to those Vietnam veterans who resided in the State before May 8, 1976, violates the Equal Protection Clause of the Fourteenth Amendment.

I

Pursuant to Art. VIII, § 5, of the New Mexico Constitution, the New Mexico State Legislature has granted annual property tax exemptions to residents who served in the Armed Forces. As applied to Vietnam veterans currently residing in New Mexico, § 7–37–5 of the New Mexico Statutes[1] exempts $2,000 of the taxable value of property for any honorably discharged Vietnam veteran who served on active duty during the Vietnam War for at least 90 continuous days, N. M. Stat. Ann. §§ 7–37–5(C)(1) and (2) (1983), and who was a New Mexico resident before May 8, 1976, § 7–37–5(C)(3)(d).[2]

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[1] Section 7–37–5 also provides the $2,000 property tax exemption, under substantially similar conditions, to certain resident veterans of World War I, World War II, and the Korean War. The one variable is the eligibility date: World War I veterans must have been residents of New Mexico before January 1, 1934; World War II veterans must have been residents before January 1, 1947; and Korean War veterans must have been residents before February 1, 1955. N. M. Stat. Ann. §§ 7–37–5(C)(3)(a), (b), and (c) (1983).

[2] The initial statute extending an exemption to Vietnam veterans required that the veteran have been a New Mexico resident before "entering the armed services from New Mexico" and also that the veteran have been "awarded a Vietnam campaign medal for services in Vietnam" during a prescribed period. 1973 N. M. Laws, Ch. 258, p. 1052. In 1975, the state legislature eliminated the medal requirement but retained the condition that the veteran have entered the Armed Forces from the State. 1975 N. M. Laws, Ch. 3, p. 11.

In 1981, the legislature dropped the requirement that the veteran have entered the military from New Mexico. The new statute extended the tax exemption to any Vietnam veteran who "was a New Mexico resident prior

Appellants, Alvin D. Hooper and his wife Mary, established residence in New Mexico on August 17, 1981. During the Vietnam War, Alvin Hooper had served for over 90 continuous days as a member of the United States Army; Hooper was honorably discharged in September 1965. For the 1983 tax year, the Hoopers applied for the $2,000 veterans' tax exemption with respect to their jointly held real property in Bernalillo County. Appellee, the Bernalillo County Assessor, denied the claim because Hooper had not been a state resident before May 8, 1975.

Appellants challenged § 7–37–5(C)(3)(d) as violative of their right to equal protection of the law and their constitutional right to migrate to New Mexico. After a hearing, the Bernalillo County Valuation Board rejected appellants' constitutional challenge and upheld the Assessor's denial of the tax exemption.[3]

The New Mexico Court of Appeals affirmed. 101 N. M. 172, 679 P. 2d 840, cert. denied, 101 N. M. 77, 678 P. 2d 705 (1984). The court, noting that the statute did not affect "such fundamental interests as voting, welfare benefits, or public medical assistance," concluded that the statute did not unconstitutionally burden an exercise of the right to travel. *Id.*, at 175, 679 P. 2d, at 843. The court held that the statute

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to . . . May 8, 1975." 1981 N. M. Laws, Ch. 187, p. 1078. In 1983, the statute was amended to provide the exemption to any Vietnam veteran "who was a New Mexico resident prior to . . . May 8, 1976." 1983 N. M. Laws, Ch. 330, p. 2112.

[3]The state legislature changed the eligibility date to May 8, 1976, after appellants had commenced administrative proceedings to challenge the denial of the exemption. The Board's decision relied on the amended 1976 date. Before the New Mexico Court of Appeals, appellee conceded that this date was inapplicable to the 1983 tax year because the legislature intended that it apply starting with the 1984 tax year. Accordingly, appellants' claimed exemption should have been denied on the basis of the 1975 eligibility date. Presumably because this discrepancy had no bearing on the constitutional issue, the Court of Appeals did not mention this point. For the sake of clarity, we analyze the statute using the 1976 eligibility date.

was consistent with the Equal Protection Clause because it "reflects legitimate state purposes" and "bears a reasonable relationship to those purposes." *Ibid.* The court reasoned that "[a] state's interest in expressing gratitude and rewarding its own citizens for honorable military service is a rational basis for veterans' preferences," and that the state legislature is "entitled to limit the period of time within which [veterans] may choose to establish residency." *Id.*, at 176, 679 P. 2d at 844.

We noted probable jurisdiction. 469 U. S. 878 (1984). We reverse.

II

The New Mexico veterans' tax exemption differs from the durational residence requirements the Court examined in *Sosna* v. *Iowa*, 419 U. S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250 (1974); *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); and *Shapiro* v. *Thompson*, 394 U. S. 618 (1969). The statutes at issue in those cases conditioned eligibility for certain benefits, otherwise available on an equal basis to all residents, on a new resident's living in the State for a fixed minimum period.[4] The durational residence requirements purported to assure that only persons who had established bona fide residence received the benefits provided residents of the States.

The New Mexico statute does not impose any threshold waiting period on those resident veterans seeking the tax exemption; resident veterans are entitled to the exemption provided they satisfy the statute's other criteria. Nor does the statute purport to establish a test of the bona fides of state residence. Instead, the tax exemption contains a fixed-date residence requirement. The statute thus divides

[4] In the durational residence cases, the Court reviewed state laws which established waiting periods on access to divorce courts, *Sosna* v. *Iowa;* eligibility for free nonemergency medical care, *Memorial Hospital* v. *Maricopa County;* qualification for voting rights, *Dunn* v. *Blumstein;* and receipt of welfare assistance, *Shapiro* v. *Thompson.*

resident Vietnam veterans into two groups: resident veterans who resided in the State before May 8, 1976, qualify for the exemption;[5] resident veterans who established residence after that date do not. Like the Alaska dividend distribution law examined in *Zobel* v. *Williams*, 457 U. S. 55 (1982), the tax exemption statute thus creates "fixed, permanent distinctions between . . . classes of concededly bona fide residents" based on when they arrived in the State. *Id.*, at 59.

Appellants established residence in New Mexico several months after the 1981 amendment set the eligibility date as May 8, 1975. Appellants have no quarrel with the legislature's changing the eligibility date after veterans have chosen to reside in New Mexico, for the enactment date is irrelevant to qualification for the tax exemption. Appellants instead challenge the distinction made by the State within the class of Vietnam veterans who currently are bona fide residents. Their challenge is that the exemption is accorded to those resident Vietnam veterans who resided in the State sometime before May 8, 1976, but not to those Vietnam veterans who have arrived since then.

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[5] This eligibility date has a curious background, which is not explained simply as "one year [after] the final U. S. troop withdrawal [from Vietnam]." 101 N. M. 172, 176, 679 P. 2d 840, 844, cert. denied, 101 N. M. 77, 678 P. 2d 705 (1984). On January 27, 1973, the United States and other participants in the conflict signed the Vietnam cease-fire agreement in Paris, France. Agreement on Ending the War and Restoring Peace in Viet-Nam, Jan. 27, 1973, [1973] 24 U. S. T. 1, T. I. A. S. No. 7542. The last American troops were withdrawn from Vietnam on March 29, 1973.

By Proclamation, President Ford designated May 7, 1975, as the last day of the "Vietnam era." Proclamation No. 4373, 3A CFR 48 (1976). The Federal Government uses this date to determine eligibility for veterans' benefits for those persons who served in the Armed Forces during the Vietnam War. See 38 U. S. C. § 101(29), which defines the "Vietnam era" as that period beginning August 5, 1964, and ending May 7, 1975. In 1981, the New Mexico State Legislature adopted this date to determine eligibility for the Vietnam veterans' tax exemption. In 1983, the state legislature changed the date to May 8, 1976, presumably to extend a "grace period" to veterans choosing to reside in New Mexico. See n. 2, *supra*.

When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[6] Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose. Appellants claim that the distinction made by the New Mexico statute should be subjected to the higher level of scrutiny applied to the durational residence requirements in *Memorial Hospital* v. *Maricopa County*, *supra*, and *Shapiro* v. *Thompson*, *supra*. Alternatively, appellants claim that the statute cannot withstand the minimum rationality inquiry applied to the Alaska dividend distribution law in *Zobel* v. *Williams*, *supra*. Appellee, on the other hand, asserts that the statute need only satisfy the latter standard of review. As in *Zobel*, if the statutory scheme cannot pass even the minimum rationality test, our inquiry ends.

III

The New Mexico Court of Appeals accepted two justifications for the distinction made by the Vietnam veterans' tax exemption statute: the exemption encourages veterans to settle in the State and it serves as an expression of the

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[6] The New Mexico Court of Appeals considered whether the veterans' tax exemption law violated appellants' constitutional right to travel. Despite disagreement over its source in the Constitution, compare *Zobel* v. *Williams*, 457 U. S. 55, 65 (1982) (BRENNAN, J., concurring), with *id.*, at 71 (O'CONNOR, J., concurring in judgment), the Court has long held that the right to travel, "when applied to residency requirements, protects new residents of a State from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents." *Id.*, at 60, n. 6; see, *e. g.*, *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 261 (1974); *Shapiro* v. *Thompson*, 394 U. S. 618, 629–631 (1969).

As we noted in *Zobel*, "[r]ight to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents." 457 U. S., at 60, n. 6. This case involves a distinction between residents based on when they first established residence in the State. Following *Zobel*, we subject this case to equal protection analysis.

State's appreciation to its "own citizens for honorable military service." 101 N. M., at 176, 679 P. 2d, at 844. Before this Court, the latter purpose has been refined as assisting "veterans who, as [New Mexico] citizens, were dependent on [the State] during a time of upheaval in their lives." Brief for Appellee 22. This rationale assumes that the State accepted a special responsibility toward those veterans who "picked up or laid down the burdens of war" as state residents.[7]

A

The distinction New Mexico makes between veterans who established residence before May 8, 1976, and those veterans who arrived in the State thereafter bears no rational relationship to one of the State's objectives—encouraging Vietnam veterans to move to New Mexico. The legislature set this eligibility date long after the triggering event occurred. See n. 2, *supra*. The legislature cannot plausibly encourage veterans to move to the State by passing such retroactive legislation.[8] It is possible that some Vietnam veterans, at least since 1981, might have been discouraged from settling in New Mexico given the State's exclusion of new resident veterans from a benefit available only to those veterans who resided in the State before May 8, 1976. "The separation of residents into classes hardly seems a likely way to persuade

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[7] The State of New Mexico, as *amicus curiae*, observes that the statute's purpose "is to reward persons who served in periods of armed conflict as residents of New Mexico or who established residency in New Mexico shortly thereafter." Brief for State of New Mexico as *Amicus Curiae* 5.

[8] Although neither appellee nor the State of New Mexico presses the point, the statute could conceivably influence certain veterans, having already moved to New Mexico, to remain there so as to secure the tax benefit. Similarly, the statute could plausibly encourage certain veterans, who had once resided in New Mexico prior to May 8, 1976, to return to the State. This selective incentive, however, would encounter the same constitutional barrier faced by the statute's distinction between past and newly arrived residents. See *infra*.

new [residents] that the State welcomes them and wants them to stay." *Zobel* v. *Williams*, 457 U. S., at 62, n. 9.[9]

B

The second purpose of the statute—rewarding veterans who resided in the State before May 8, 1976, for their military service—was primarily relied upon by the New Mexico Court of Appeals to support the statute's distinction between resident veterans. One component of this rationale is, of course, plainly legitimate; only recently we observed that "[o]ur country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation With Representation of Wash.*, 461 U. S. 540, 551 (1983) (footnote omitted); see *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279, n. 25 (1979). And as Judge Friendly has noted, the various preferences for veterans are grounded in a "[d]esire to compensate in some measure for the disruption of a way of life . . . and to express gratitude . . . ." *Russell* v. *Hodges*, 470 F. 2d 212, 218 (CA2 1972). See *Regan* v. *Taxation With Representation of Wash.*, *supra*, at 551.

Consistent with this policy, the State may award certain benefits to all its bona fide veterans, because it then is making neither an invidious nor irrational distinction among its residents. Resident veterans, as a group, may well deserve preferential treatment,[10] and such differential treatment vis-à-vis non-veterans does not offend the Equal Protection Clause. See, *e. g.*, *Personnel Administrator of Mass.* v. *Feeney*, *supra*; see also *Johnson* v. *Robison*, 415 U. S. 361 (1974).

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[9] A state objective to inhibit migration into the State would encounter "insurmountable constitutional difficulties." *Zobel*, *supra*, at 62, n. 9. See *Shapiro* v. *Thompson*, *supra*, at 629.

[10] For a compilation of the variety of state veterans' preference statutes, see House Committee on Veterans' Affairs, State Veterans' Laws, 98th Cong., 2d Sess., 1–306 (Comm. Print No. 47, 1984).

The New Mexico statute, however, does not simply distinguish between resident veterans and non-veteran residents; it confers a benefit only on "established" resident veterans, *i. e.*, those who resided in the State before May 8, 1976. Appellee and the State justify this distinction on the basis that those veterans who left their homes in New Mexico to fight in Vietnam, as well as those who settled in the State within the few years after the war ended, deserve to be treated differently from veterans who make New Mexico their home after May 8, 1976. The legislature is said to have decided it owed a special responsibility to these "established" veterans.

Appellee and the State's evaluation of this legislative judgment may be questioned on its own terms. Those who serve in the military during wartime inevitably have their lives disrupted; but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service. Moreover, the legislature provided this economic boon years after the dislocation occurred. Established state residents, by this time, presumably had become resettled in the community and the modest tax exemption hardly bears directly on the transition to civilian life long after the war's end. Finally, the benefit of the tax exemption continues for the recipient's life. The annual exemption, which will benefit this limited group of resident veterans long after the wartime disruption dissipated, is a continuing bounty for one group of residents rather than simply an attempt to ease the veteran's return to civilian life.

Even assuming that the State may legitimately grant benefits on the basis of a coincidence between military service and past residence,[11] the New Mexico statute's distinction

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[11] Veterans' benefit statutes, which condition eligibility on state residence at the time of induction into the military, have survived challenges under the Equal Protection Clause before *Zobel* was decided. See, *e. g.*, *Langston* v. *Levitt*, 425 F. Supp. 642 (SDNY 1977); *August* v. *Bronstein*,

between resident veterans is not rationally related to the State's asserted legislative goal. The statute is not written to require any connection between the veteran's prior residence and military service.[12] Indeed, the veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State at any time in the future regardless of where he resided before, during, or after military service.

C

Stripped of its asserted justifications, the New Mexico statute suffers from the same constitutional flaw as the Alaska statute in *Zobel*.[13] The New Mexico statute, by singling out previous residents for the tax exemption, rewards

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369 F. Supp. 190 (SDNY), summarily aff'd, 417 U. S. 901 (1974); *Leech* v. *Veterans' Bonus Division Appeals*, 179 Conn. 311, 426 A. 2d 289 (1979).

The Court's summary affirmance in *August* v. *Bronstein* may not be read as an adoption of the reasoning of the judgment under review. *Zobel* v. *Williams*, 457 U. S., at 64, n. 13; *Fusari* v. *Steinberg*, 419 U. S. 379, 391 (1975) (concurring opinion). Indeed, the Second Circuit recently has ruled that such a statute could not pass muster under the Equal Protection Clause in light of the Court's holding in *Zobel*. *Soto-Lopez* v. *New York City Civil Service Comm'n*, 755 F. 2d 266 (1985), appeal docketed, No. 84–1803. Given the circumstances presented in this case, we need not consider here the constitutionality of these statutes.

[12] Compare the New Mexico open-ended prior-residence requirement with the specific criteria of Ill. Rev. Stat. Ch. 126½, ¶ 57.52 (1983); Ky. Rev. Stat. § 40.005 (1980); and Pa. Stat. Ann., Tit. 51, §§ 20122, 20123 (1976 and Supp. 1984–1985) (Purdon).

We also note that the New Mexico statute differs from the local "bounty" laws enacted during the Civil War era, through which States paid residents cash bonuses for enlisting. See generally E. Murdock, Patriotism Unlimited, 1862–1865, pp. 16–41 (1967).

[13] In *Zobel* v. *Williams*, the Court held that an Alaska statute that used length of state residence to calculate distribution of dividends from the State's oil reserves violated the Equal Protection Clause. We made clear that the statute's only conceivable purpose—"to reward citizens for past contributions"—is "not a legitimate state purpose." 457 U. S., at 63; see *id.*, at 68 (BRENNAN, J., concurring).

only those citizens for their "past contributions" toward our Nation's military effort in Vietnam. *Zobel* teaches that such an objective is "not a legitimate state purpose." 457 U. S., at 63. The State may not favor established residents over new residents based on the view that the State may take care of "its own," if such is defined by prior residence. Newcomers, by establishing bona fide residence in the State, become the State's "own" and may not be discriminated against solely on the basis of their arrival in the State after May 8, 1976. See, *e. g.*, *Vlandis* v. *Kline*, 412 U. S. 441, 449–450, and n. 6 (1973); *Shapiro* v. *Thompson*, 394 U. S., at 632–633; *Passenger Cases*, 7 How. 283, 492 (1849) (Taney, C. J., dissenting).

The New Mexico statute creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense "second-class citizens." This discrimination on the basis of residence is not supported by any identifiable state interest; the statute is not written to benefit only those residents who suffered dislocation within the State's borders by reason of military service. *Zobel* made clear that the Constitution will not tolerate a state benefit program that "creates fixed, permanent distinctions . . . between . . . classes of concededly bona fide residents, based on how long they have been in the State." 457 U. S., at 59.[14] Neither the Equal Protection Clause, nor this Court's precedents, permit the State to prefer established resident veterans over newcomers in the retroactive apportionment of an economic benefit.

D

We decline appellants' request to rule on the severability of the unconstitutional aspect of the New Mexico veterans' tax

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[14] Concurring in *Zobel*, JUSTICE BRENNAN noted that the Citizenship Clause of the Fourteenth Amendment "does not provide for, and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions." *Id.*, at 69 (footnote omitted).

exemption statute. If the fixed-date residence requirement, § 7–37–5(C)(3)(d), were excised from the statute, the exemption would be available to all current resident veterans who served the requisite 90 days during the Vietnam War and received honorable discharges. It is for the New Mexico courts to decide, as a matter of state law, whether the state legislature would have enacted the statute without the invalid portion. See, *e. g.*, *Zobel* v. *Williams*, *supra*, at 64–65; *Champlin Refining Co.* v. *Corporation Comm'n of Oklahoma*, 286 U. S. 210, 234 (1932); *State* v. *Spearman*, 84 N. M. 366, 368, 503 P. 2d 649, 651 (App. 1972).

IV

We hold that the New Mexico veterans' tax exemption statute violates the guarantees of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, the judgment of the New Mexico Court of Appeals is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

JUSTICE POWELL took no part in the decision of the case.

JUSTICE BRENNAN, concurring.

I join the Court's opinion for the reasons stated therein and in my concurring opinion in *Zobel* v. *Williams*, 457 U. S. 55, 65 (1982).

JUSTICE STEVENS, with whom JUSTICE REHNQUIST and JUSTICE O'CONNOR join, dissenting.

Vietnam veterans are, of course, a distinct minority of the population of New Mexico.[1] The majority has decided to

[1] Approximately 55,000 Vietnam veterans reside in New Mexico. U. S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States 1985, p. 346 (105th ed. 1984) (estimate as of 1983), accounting for little more than 3.9% of the population. See *id.*, at 11. Veterans as a whole comprise less than 11.6% of New Mexico's residents. See *id.*, at 11, 346.

provide them with a special benefit that is not available to the average citizen. In my opinion, there can be no question about the constitutionality of that decision, and I believe it is equally clear that there is nothing invidious in the way the State has defined the class of veterans eligible for the benefit. The validity of the classification is unaffected by the form of the benefit or the date of enactment of the statute. It does not violate the Equal Protection Clause of the Fourteenth Amendment.

I

The New Mexico legislation that is challenged in this case provides a $2,000 property tax exemption to Vietnam veterans (or their unmarried surviving spouses) if the veteran was, among other requirements, a New Mexico resident prior to May 8, 1976.[2] N. M. Stat. Ann. § 7–37–5(C) (1983). This legislation is consistent with the Equal Protection Clause if "the distinction it makes rationally furthers a legitimate state purpose." *Zobel* v. *Williams*, 457 U. S. 55, 60 (1982).

Arguably, this statute raises two questions under the Equal Protection Clause: (1) is there a rational justification for treating the eligible veterans more favorably than the average citizen; and (2) if so, is there any rational justification

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[2] The legislation is the product of four separate enactments. See *ante*, at 614–615, n. 2. In 1973, the New Mexico Legislature decided to grant a $2,000 property tax exemption to Vietnam veterans who had entered the Armed Forces from New Mexico and had been awarded a campaign medal for service in Vietnam. 1973 N. M. Laws, ch. 258, p. 1052. On three occasions after the original benefit was authorized, the New Mexico Legislature decided to enlarge the class of eligible beneficiaries. In 1975, it eliminated the requirement of a campaign medal for service in Vietnam, 1975 N. M. Laws, ch. 3, p. 11, and in 1981, it eliminated the requirement of residence at the time of enlistment and substituted a requirement of residence prior to May 8, 1975, 1981 N. M. Laws, ch. 187, p. 1078, the last day of the "Vietnam era" as proclaimed by President Ford. Presidential Proclamation No. 4373, 3A CFR 48 (1975). In 1983, it extended eligibility to veterans who had been residents before May 8, 1976. 1983 N. M. Laws, ch. 330, p. 2112.

for not offering the benefit to all veterans who then lived, or might thereafter live, in New Mexico?

The justification for providing a special benefit for veterans, as opposed to nonveterans, has been recognized throughout the history of our country. It merits restatement. First, the simple interest in expressing the majority's gratitude for services that often entail hardship, hazard, and separation from family and friends, and that may be vital to the continued security of our Nation, is itself an adequate justification for providing veterans with a tangible token of appreciation. Second, recognition of the fact that military service typically disrupts the normal progress of civilian employment justifies additional tangible benefits—employment preferences, educational opportunities, subsidized loans, tax exemptions, or cash bonuses—to help overcome the adverse consequences of service and to facilitate the reentry into civilian society. A policy of providing special benefits for veterans' past contributions has "always been deemed to be legitimate."[3]

The historic justification would support a state decision to provide a benefit for *all* Vietnam veterans.[4] This case, however, involves a challenge to a decision to provide a benefit

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[3] "Veterans have 'been obliged to drop their own affairs to take up the burdens of the nation,' *Boone* v. *Lightner*, 319 U. S. 561, 575 (1943), '"subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life."' *Johnson* v. *Robison*, 415 U. S. 361, 380 (1974) (emphasis deleted). Our country has a longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages. This policy has 'always been deemed to be legitimate.' *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279, n. 25 (1979)." *Regan* v. *Taxation with Representation of Wash.*, 461 U. S. 540, 550–551 (1983) (footnote omitted).

[4] Although the Court's opinion is ambiguous on this point, see *ante*, at 620, I do not understand it to invalidate laws limiting benefits to veterans who resided in the State immediately prior to induction.

for *some*, but not all, veterans residing in New Mexico. What is the justification for placing any limit on the class of eligible veterans? The most obvious answer is that the State's resources are not infinite. The need to budget for the future is itself a valid reason for concluding that a limit should be placed on the size of the class of potential beneficiaries. And surely that limit may be defined in a way that is intended to direct finite state resources to those who may have a special need.

In this case, New Mexico's legislation reflects, not only an expression of gratitude, but also an attempt to ameliorate the hardship Vietnam veterans experienced upon seeking to integrate or reintegrate themselves into New Mexican society. The transition from military to civilian life has always been a difficult one. That transition is furthered by a state decision to provide a benefit for those veterans who once had roots in the State and had returned, or decided to settle in the State, after their military service ended. New Mexico's modest monetary benefit can be reasonably understood as both a tangible and symbolic "welcome home" to veterans returning to New Mexico from the Far East as well as to those deciding to establish their domiciles in the State for the first time. The legislation simply reflects and recognizes the State's felt obligation to facilitate the difficult transition of veterans from the battlefields of Asia to civilian life in New Mexico.

Of course, the legislature might have crafted a more elaborate set of eligibility criteria, but since exclusion from the favored class merely places the ineligible veteran in the same class as the majority of the citizenry, there is no constitutional objection to the use of a simple, easily administered standard. The statutory requirement of residence before May 8, 1976, is not a perfect proxy for identifying those Vietnam veterans seeking admission or readmission into New Mexican society, but "rational distinctions may be made with substantially less than mathematical exactitude." *New Orleans* v. *Dukes*, 427 U. S. 297, 303 (1976).

II

In my opinion, the validity of the State's classification is not undermined by the fact that it takes the form of a modest annual tax exemption instead of a cash payment or gold medal. It is true that the continuing character of the exemption differentiates the eligible veteran from the rest of the citizenry over an extended period of time, but I fail to see how that fact bears on the rationality of the classification. If New Mexico had awarded gold medallions to all of its resident veterans on May 1, 1976, I believe it would be absurd for a veteran arriving in the State in 1981 to claim that he or she had a constitutional right either to a comparable medal or to have all other medal recipients return them to the State.

In like manner, New Mexico by this legislation has provided, in effect, a modest annuity for veterans who own real property. Again, it is surely rational for the State to provide this form of assistance rather than a lump-sum cash bonus. To begin with, a one-time cash bonus would concentrate the fiscal burden of the veterans benefit in one budget year, perhaps preventing New Mexico from awarding any meaningful veterans benefit at all.[5] Rather than providing a trivial token of esteem, the State may have decided to provide an annual and therefore recurring benefit which would, over time, amount to a more significant recognition of service to returning veterans. The perennial character of its tax exemption may have been especially important in the minds of New Mexico's legislators if their objective was to provide a symbolic expression of New Mexico's invitation to rejoin the community on a long-term basis: The recurring form of the benefit provided symbolic reassurance of state support year

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[5] After World War II, for example, the legislature decided to extend a property tax exemption to veterans of that war because it felt unable to finance a lump-sum cash bonus. For the background of this decision, see Albuquerque Journal, Mar. 10, 1947, p. 2, col. 4; *id.*, Feb. 25, 1947, p. 1, col. 3; *id.*, Jan. 19, 1947, p. 4, cols. 4–5; *id.*, Jan. 8, 1947, p. 1, cols. 2–3; *id.*, Jan. 5, 1947, p. 10, col. 2.

after year. In so doing, the State might sensibly have expected to instill in returning Vietnam veterans a sense of security and peace of mind after the tumult of that conflict.

For these reasons, New Mexico's statute is not at all like the Alaska dividend program struck down in *Zobel* v. *Williams*, 457 U. S. 55 (1982). The dividend program involved in *Zobel* created "an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." *Id.*, at 59. Every recent arrival was treated less favorably than those who had arrived earlier. The vast majority of dividend recipients were thus treated more favorably than the newly arrived minority. In this case, in contrast, the alleged victim of the discrimination is being treated exactly like the vast majority of New Mexico's residents. In *Zobel*, the program had no rational justification other than a purpose to allocate a cash surplus among the majority of the citizenry on the basis of the duration of their residence in the State. In this case, the duration of the veteran's residence is irrelevant and the distribution to the members of the favored class is supported by a legitimate state interest.[6] There is a world of difference between a decision to provide benefits to some, but not all, veterans and a decision to divide the entire population into a multitude

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[6] The Court, however, makes the following remarkable statement:

"The New Mexico statute, by singling out previous residents for the tax exemption, rewards only those citizens for their 'past contributions' toward our nation's military effort in Vietnam. *Zobel* teaches that such an objective is 'not a legitimate state purpose.' 457 U. S., at 63." *Ante*, at 622–623.

Of course, what *Zobel* taught was that "past contributions" amounting to nothing more than residence in the State do not justify discrimination in favor of long-time residents; *Zobel* surely did not imply that past contributions to the Nation's military effort would not justify a special reward, as the Court implicitly acknowledges when it recognizes as legitimate this Nation's "'longstanding policy of compensating veterans for their past contributions by providing them with numerous advantages.'" *Ante*, at 620 (quoting *Regan* v. *Taxation With Representation of Wash.*, 461 U. S., at 551).

of classes differentiated only by length of residence. The State's refusal to provide appellant with a veteran's benefit has not branded him with any badge of inferiority. He has not been treated as a "second class citizen" in any sense. Rather, he has merely received precisely the same treatment as the vast majority of the residents of New Mexico.

III

The Court finds constitutionally significant the fact that the May 8, 1976, cut-off date was not enacted until 1983,[7] and in its understanding of the application of the statute to a veteran who had merely resided in New Mexico as an infant. See *ante*, at 622. Neither point is valid.

Tellingly, the initial version of New Mexico's property tax exemption for Vietnam-era veterans—which was enacted in 1973—had an effective date of January 1, 1975. Even if the Court's concern with "retroactive apportionment of an economic benefit," *ante*, at 623, were valid—and the constitutional defect in retroactivity is never explained—the originating legislation simply was not retroactive.[8] Thus, the Court's point at best is limited to the state legislature's decision on two subsequent occasions to liberalize the statutory requirements by extending the cut-off date for eligibility. But the Court does not—and cannot—explain why New

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[7] See *ante*, at 621.

[8] Indeed, the New Mexico Legislature frequently extended the property tax exemption to veterans on a prospective basis. See 1933 N. M. Laws, ch. 44, p. 47 (approved Mar. 1, 1933, and applicable to all veterans of World War I resident as of Jan. 1, 1934); 1923 N. M. Laws, ch. 130, p. 193 (approved Mar. 12, 1923, and applicable to all resident veterans). Other legislation was retroactive only by a few months. See 1947 N. M. Laws, ch. 79, p. 116 (approved Mar. 13, 1947, and applicable to all veterans of World War II resident as of Jan. 1, 1947). But see 1957 N. M. Laws, ch. 169, p. 256 (approved Mar. 28, 1957, and applicable to all Korean conflict veterans resident as of Jan. 1, 1955).

Mexico's belated recognition that its veterans' assistance program was incomplete[9] renders it *ipso facto* unconstitutional.

Even if New Mexico's action were wholly retroactive I would find no constitutional defect. The New Mexico Legislature could reasonably conclude that for many Vietnam veterans the transition from military service to civilian life in New Mexico was still incomplete. New Mexico could further reasonably conclude that some assistance, at once tangible and symbolic, was required to complete the task. I do not think it unconstitutional for New Mexico to presume that Vietnam veterans who arrived in that State more than a year after the end of the Vietnam epoch had successfully readjusted to civilian life in a sister State prior to migrating to New Mexico.[10] Under this view, appellant simply was not in New Mexico when the conditions justifying the assistance were deemed to exist. The late-arriving Vietnam veteran is treated as well as the overwhelming majority of immigrants to the State; until today's decision, I would not have thought that the Constitution required New Mexico to do more.

In an attempt to highlight the asserted irrationality of the New Mexico statute, the Court asserts that an unquantifiable few late-in-coming Vietnam veterans might qualify for the property tax exemption:

> "[T]he veteran who resided in New Mexico as an infant long ago would immediately qualify for the exemption upon settling in the State at any time in the future

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[9] The 1983 law was captioned as an amendment "to enlarge the period during which a Vietnam veteran may qualify for an exemption from property taxes." 1983 N. M. Laws, ch. 330, p. 2111.

[10] Nor would I hold unconstitutional a provision in a State's veterans' assistance law which excluded veterans who had already received benefits in another State. New Mexico's limitation of eligibility to Vietnam veterans taking up residence in the State prior to May 8, 1976, may in purpose and in practice have served to prevent "double-dipping" of just this kind.

> regardless of where he resided before, during, or after military service." *Ante*, at 622.

The New Mexico Court of Appeals, however, did not adopt this construction of the statute: it did not reach this state-law question because appellant did not have standing to raise it.[11] There is thus nothing in the record to support the Court's assumption that if a veteran who resided in New Mexico as an infant should now return to the State, he or she would qualify for the tax exemption. It hardly befits a federal court that is committed to a policy of avoiding constitutional questions whenever possible to volunteer an unnecessary interpretation of a state statute in order to create a constitutional infirmity. But there is a more fundamental defect in the Court's argument—indeed, in its entire analysis.

Even if there are a few isolated cases in which the general classification produces an arbitrary result, that is surely not a sufficient reason for concluding that the entire statute is unconstitutional:

> "The mere fact that an otherwise valid general classification appears arbitrary in an isolated case is not a sufficient reason for invalidating the entire rule. Nor, indeed, is it a sufficient reason for concluding that the application of a valid rule in a hard case constitutes a

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[11] The State Court of Appeals wrote:

"Hooper points out that the statute is unclear as to whether the requirement at issue is a continuous residency requirement and that a veteran with only one day of New Mexico residency, immediately followed by an extended period of nonresidency prior to May 8, 1976, might qualify for the exemption where Alvin D. Hooper does not.

"Such arguments are not, standing alone, sufficient to allow this court to consider the issues raised. The exemption was not denied on either ground raised in support of this position. Hooper does not have standing to challenge the statute on the due process grounds of vagueness raised, and we decline to issue an advisory opinion on the matter. *Advance Loan Co.* v. *Kovach*, 79 N. M. 509, 445 P. 2d 386 (1968); *Asplund* v. *Alarid*, 29 N. M. 129, 219 P. 786 (1923)." 101 N. M. 172, 177, 679 P. 2d 840, 845 (1984).

> violation of equal protection principles. We cannot test the conformance of rules to the principle of equality simply by reference to exceptional cases." *Caban* v. *Mohammed*, 441 U. S. 380, 411–412 (1979) (STEVENS, J., dissenting) (footnotes omitted).

See also *Vance* v. *Bradley*, 440 U. S. 93, 108 (1979); *Califano* v. *Jobst*, 434 U. S. 47, 56–58 (1977); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970).

New Mexico has elected to express its gratitude to the veterans of the Vietnam conflict by providing a modest tax exemption for those who resided in the State before May 8, 1976. Those veterans who arrived thereafter are treated exactly like the nonveterans who constitute the majority of the State's population. In my opinion, there is no substance to the claim that this classification violates the principle of equality embodied in the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[12]

Accordingly, I respectfully dissent.

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[12] I also discern no substance to appellants' claim that the statutory classification violates the Due Process Clause of the Fourteenth Amendment. I further note that appellants' jurisdictional statement raised no claim that New Mexico's statute violates the Privileges and Immunities Clause of Article IV of the Constitution.

IN RE SNYDER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84–310. Argued April 16, 1985—Decided June 24, 1985

Petitioner, who was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act (Act), was awarded almost $1,800 by the court for services and expenses in handling the assignment. As required by the Act with regard to expenditures for compensation in excess of $1,000, the Chief Judge of the Court of Appeals for the Eighth Circuit reviewed the claim, found it to be insufficiently documented, and returned it with a request for additional documentation. Because of computer problems, petitioner could not readily provide the information in the requested form, but filed a supplemental application. The Chief Judge's secretary again returned the application, stating that petitioner's documentation was unacceptable; petitioner then discussed the matter with the District Judge's secretary, who suggested that he write a letter expressing his views. In October 1983, petitioner wrote a letter to the District Judge's secretary in which (in an admittedly "harsh" tone) he declined to submit further documentation, refused to accept further assignments under the Act, and criticized the administration of the Act. Viewing the letter as seeking changes in the process for providing fees, the District Judge discussed those concerns with petitioner and then forwarded the letter to the Chief Judge. In subsequent correspondence with the District Judge, the Chief Judge of the Circuit stated, *inter alia*, that he considered petitioner's October letter to be "totally disrespectful to the federal courts and to the judicial system," and that unless petitioner apologized an order would be issued directing petitioner to show cause why he should not be suspended from practice in the Circuit. After petitioner declined to apologize, an order was issued directing petitioner to show cause why he should not be suspended for his "refusal to carry out his obligations as a practicing lawyer and officer of [the] court" because of his refusal to accept assignments under the Act; however, at the subsequent hearing the Court of Appeals focused on whether petitioner's October letter was disrespectful, and petitioner again refused to apologize for the letter. Ultimately, the Court of Appeals suspended petitioner from the practice of law in the federal courts in the Circuit for six months, indicating that its action was based on petitioner's "refusal to show continuing respect for the court," and specifically finding that petitioner's "disrespectful statements" in his October letter as to the court's

administration of the Act constituted "contumacious conduct" rendering him "not presently fit to practice law in the federal courts."

Held: Petitioner's conduct and expressions did not warrant his suspension from practice. Pp. 642–647.

(a) Under Federal Rule of Appellate Procedure 46, which sets forth the standard for disciplining attorneys practicing before the courts of appeals, an attorney may be suspended or disbarred if found guilty of "conduct unbecoming a member of the bar of the court." The quoted phrase must be read in light of the complex code of behavior to which attorneys are subject, reflecting the burdens inherent in the attorney's dual obligations to clients and to the system of justice. In this light, "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. Pp. 642–645.

(b) Petitioner's refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee, but the record does not support the Court of Appeals' action suspending petitioner from practice; the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept cases under the Act. A lawyer's criticism of the administration of the Act or of inequities in assignments under the Act does not constitute cause for suspension; as officers of the court, members of the bar may appropriately express criticism on such matters. Even assuming that petitioner's October letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in the context here—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is not presently fit to practice law in the federal courts; nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice. Pp. 645–647.

734 F. 2d 334, reversed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the decision of the case.

David L. Peterson argued the cause for petitioner. With him on the briefs were *Robert P. Bennett*, *John C. Kapsner*, *Charles L. Chapman*, and *Irvin B. Nodland*.

John J. Greer argued the cause for respondent United States Court of Appeals for the Eighth Circuit. With him on the brief was *Ross H. Sidney*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the judgment of the Court of Appeals suspending petitioner from practice in all courts of the Eighth Circuit for six months.

I

In March 1983, petitioner Robert Snyder was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act. After petitioner completed the assignment, he submitted a claim for $1,898.55 for services and expenses. The claim was reduced by the District Court to $1,796.05.

Under the Criminal Justice Act, the Chief Judge of the Court of Appeals was required to review and approve expenditures for compensation in excess of $1,000.[1] 18 U. S. C. § 3006A(d)(3). Chief Judge Lay found the claim insufficiently documented, and he returned it with a request for additional information. Because of technical problems with his computer software, petitioner could not readily provide the information in the form requested by the Chief Judge. He did, however, file a supplemental application.

The secretary of the Chief Judge of the Circuit again returned the application, stating that the proffered documentation was unacceptable. Petitioner then discussed the matter with Helen Monteith, the District Court Judge's secretary, who suggested he write a letter expressing his view. Peti-

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**Charles S. Sims* filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Frank E. Bazler and *Albert L. Bell* filed a brief for the Ohio State Bar Association as *amicus curiae*.

[1] The statutory limit has since been raised to $2,000. 18 U. S. C. § 3006A(d)(2) (1982 ed., Supp. III).

tioner then wrote the letter that led to this case. The letter, addressed to Ms. Monteith, read in part:

> "In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.
>
> "Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.
>
> "Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.
>
> "Thank you for your time and attention." App. 14–15.

The District Court Judge viewed this letter as one seeking changes in the process for providing fees, and discussed these concerns with petitioner. The District Court Judge then forwarded the letter to the Chief Judge of the Circuit. The Chief Judge in turn wrote to the District Judge, stating that he considered petitioner's letter

> "totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts." *Id.*, at 16.

The Chief Judge expressed concern both about petitioner's failure to "follow the guidelines and [refusal] to cooperate with the court," and questioned whether, "in view of the let-

ter" petitioner was "worthy of practicing law in the federal courts on any matter." He stated his intention to issue an order to show cause why petitioner should not be suspended from practicing in any federal court in the Circuit for a period of one year. *Id.*, at 17–18. Subsequently, the Chief Judge wrote to the District Court again, stating that if petitioner apologized the matter would be dropped. At this time, the Chief Judge approved a reduced fee for petitioner's work of $1,000 plus expenses of $23.25.

After talking with petitioner, the District Court Judge responded to the Chief Judge as follows:

> "He [petitioner] sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause. . . .
>
> "He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it." *Id.*, at 20.

The Chief Judge then issued an order for petitioner to show cause why he should not be suspended for his "refusal to carry out his obligations as a practicing lawyer and officer of [the] court" because of his refusal to accept assignments under the Criminal Justice Act. *Id.*, at 22. Nowhere in the order was there any reference to any disrespect in petitioner's letter of October 6, 1983.

Petitioner requested a hearing on the show cause order. In his response to the order, petitioner focused exclusively on whether he was required to represent indigents under the Criminal Justice Act. He contended that the Act did not compel lawyers to represent indigents, and he noted that many of the lawyers in his District had declined to serve.[2]

[2] A resolution presented by the Burleigh County Bar Association to the Court of Appeals on petitioner's behalf stated that of the 276 practitioners eligible to serve on the Criminal Justice Act panel in the Southwestern

He also informed the court that prior to his withdrawal from the Criminal Justice Act panel, he and his two partners had taken 15 percent of all the Criminal Justice Act cases in their district.

At the hearing, the Court of Appeals focused on whether petitioner's letter of October 6, 1983, was disrespectful, an issue not mentioned in the show cause order. At one point, Judge Arnold asked: "I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter?" *Id.*, at 40. Petitioner answered: "That is not the basis that I am being brought forth before the court today." *Ibid.* When the issue again arose, petitioner protested: "But, it seems to me we're getting far afield here. The question is, can I be suspended from this court for my request to be removed from the panel of attorneys." *Id.*, at 42.

Petitioner was again offered an opportunity to apologize for his letter, but he declined. At the conclusion of the hearing, the Chief Judge stated:

> "I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work that you stand willing and ready to perform such work and will comply with the guidelines of the statute. And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6." *Id.*, at 50.

Following the hearing, petitioner wrote a letter to the court, agreeing to "enthusiastically obey [the] mandates" of any new plan for the implementation of the Criminal Justice Act in North Dakota, and to "make every good faith effort possible" to comply with the court's guidelines regarding com-

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Division of the District of North Dakota, only 87 were on the panel. App. 85.

pensation under the Act. Petitioner's letter, however, made no mention of the October 6, 1983, letter. *Id.*, at 51–52.

The Chief Judge then wrote to Snyder, stating among other things:

> "The court expressed its opinion at the time of the oral hearing *that interrelated with our concern* and the issuance of the order to show cause *was the disrespect that you displayed* to the court by way of your letter addressed to Helen Montieth *[sic]*, Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.
>
> "Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.
>
> "Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order." *Id.*, at 52–53. (Emphasis added.)

Petitioner responded to the Chief Judge:

> "I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. . . .
>
> "It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences." *Id.*, at 54.

After receipt of this letter, petitioner was suspended from the practice of law in the federal courts in the Eighth Circuit for six months. 734 F. 2d 334 (1984). The opinion stated

that petitioner "contumaciously refused to retract his previous remarks or apologize to the court." *Id.*, at 336. It continued:

> "[Petitioner's] refusal to show continuing respect for the court *and his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements* are sufficient to demonstrate to this court *that he is not presently fit to practice law in the federal courts.* All courts depend on the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. . . . Without hesitation *we find Snyder's disrespectful statements* as to this court's administration of CJA *contumacious conduct.* We deem this unfortunate.
>
> "We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted." *Id.*, at 337. (Emphasis added.)

The opinion specifically stated that petitioner's offer to serve in Criminal Justice Act cases in the future if the panel was equitably structured had "considerable merit." *Id.*, at 339.

Petitioner moved for rehearing en banc. In support of his motion, he presented an affidavit from the District Judge's secretary—the addressee of the October 6 letter—stating that she had encouraged him to send the letter. He also submitted an affidavit from the District Judge, which read in part:

> "*I did not view the letter as one of disrespect for the Court,* but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.

". . . Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me." App. 83–84. (Emphasis added.)

The petition for rehearing en banc was denied.[3] An opinion for the en banc court stated:

"The gravamen of the situation is that Snyder in his letter [of October 6, 1983] became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

. . . . . .

". . . Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself." 734 F. 2d, at 343. (Emphasis added.)

The en banc court opinion stayed the order of suspension for 10 days, but provided that the stay would be lifted if petitioner failed to apologize. He did not apologize, and the order of suspension took effect.

We granted certiorari, 469 U. S. 1156 (1985). We reverse.

II

A

Petitioner challenges his suspension from practice on the grounds (a) that his October 6, 1983, letter to the District Judge's secretary was protected by the First Amendment, (b) that he was denied due process with respect to the notice of the charge on which he was suspended, and (c) that his challenged letter was not disrespectful or contemptuous. We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case. Accordingly, we consider first whether petitioner's conduct and expressions

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[3] 734 F. 2d, at 341. Circuit Judges Bright and McMillian voted to grant the petition for rehearing en banc.

warranted his suspension from practice; if they did not, there is no occasion to reach petitioner's constitutional claims.

Courts have long recognized an inherent authority to suspend or disbar lawyers. *Ex parte Garland*, 4 Wall. 333, 378–379 (1867); *Ex parte Burr*, 9 Wheat. 529, 531 (1824). This inherent power derives from the lawyer's role as an officer of the court which granted admission. *Theard* v. *United States*, 354 U. S. 278, 281 (1957). The standard for disciplining attorneys practicing before the courts of appeals[4] is set forth in Federal Rule of Appellate Procedure 46:[5]

> "*(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of*

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[4] The panel opinion made explicit that Snyder was suspended from the District Court as well as the Court of Appeals by stating: "[T]hereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted." 734 F. 2d, at 337.

Federal Rule of Appellate Procedure 46 does not appear to give authority to the Court of Appeals to suspend attorneys from practicing in the District Court. As the panel opinion itself indicates, the admission of attorneys to practice before the District Court is placed, as an initial matter, before the District Court itself. The applicable Rule of the District Court indicates that a suspension from practice before the Court of Appeals creates only a rebuttable presumption that suspension from the District Court is in order. The Rule appears to entitle the attorney to a show cause hearing before the District Court. Rule 2(e)(2), United States District Court for the District of North Dakota, reprinted in Federal Local Rules for Civil and Admiralty Proceedings (1984). A District Court decision would be subject to review by the Court of Appeals.

[5] The Court of Appeals relied on Federal Rule of Appellate Procedure 46(c) for its action. While the language of Rule 46(c) is not without some ambiguity, the accompanying note of the Advisory Committee on Appellate Rules, 28 U. S. C. App., p. 496, states that this provision "is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules." The appropriate provision under which to consider the sanction of suspension would have been Federal Rule of Appellate Procedure 46(b), which by its terms deals with "suspension or disbarment."

> *the bar of the court, he will be subject to suspension or disbarment by the court.* The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order." (Emphasis added.)

The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. *In re Bithoney*, 486 F. 2d 319, 324 (CA1 1973). Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:

> "'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470–471, 162 N. E. 487, 489 (1928) (citation omitted).

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner

compatible with the role of courts in the administration of justice.

Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.[6]

B

Apparently relying on an attorney's obligation to avoid conduct that is "prejudicial to the administration of justice,"[7] the Court of Appeals held that the letter of October 6, 1983,

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[6] The Court of Appeals stated that the standard of professional conduct expected of an attorney is defined by the ethical code adopted by the licensing authority of an attorney's home state, 734 F. 2d, at 336, n. 4, and cited the North Dakota Code of Professional Responsibility as the controlling expression of the conduct expected of petitioner. The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law. *Hertz* v. *United States*, 18 F. 2d 52, 54–55 (CA8 1927).

The Court of Appeals was entitled, however, to charge petitioner with the knowledge of and the duty to conform to the state code of professional responsibility. The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court; the provision that suspension in any other court of record creates a basis for a show cause hearing indicates that Rule 46 anticipates continued compliance with the state code of conduct.

[7] 734 F. 2d, at 336–337. This duty is almost universally recognized in American jurisdictions. See, *e. g.*, Disciplinary Rule 1–102(A)(5), North Dakota Code of Professional Responsibility; Rule 8.4(d), American Bar Association, Model Rules of Professional Conduct (1983); Disciplinary Rule 1–102(A)(5), American Bar Association, Model Code of Professional Responsibility (1980).

and an unspecified "refusal to show continuing respect for the court" demonstrated that petitioner was "not presently fit to practice law in the federal courts." 734 F. 2d, at 337. Its holding was predicated on a specific finding that petitioner's "disrespectful statements [in his letter of October 6, 1983] as to this court's administration of the CJA [constituted] contumacious conduct." *Ibid.*

We must examine the record in light of Rule 46 to determine whether the Court of Appeals' action is supported by the evidence. In the letter, petitioner declined to submit further documentation in support of his fee request, refused to accept further assignments under the Criminal Justice Act, and criticized the administration of the Act. Petitioner's refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee; however, the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept Criminal Justice Act cases.

We do not consider a lawyer's criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had "merit," 734 F. 2d, at 339, and the court instituted a study of the administration of the Criminal Justice Act as a result of petitioner's complaint. Officers of the court may appropriately express criticism on such matters.

The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was "harsh," and, indeed it can be read as ill-

mannered. All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is "not presently fit to practice law in the federal courts." Nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN took no part in the decision of this case.

CORNELIUS, ACTING DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT *v.* NUTT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 83–1673. Argued January 7, 1985—Decided June 24, 1985

Under the Civil Service Reform Act of 1978 (Act), a federal employee may challenge agency disciplinary action by appealing the agency's decision to the Merit Systems Protection Board (Board), or if he is a member of a federal employees' labor union he may, in the alternative, challenge the action through any grievance and arbitration procedure provided by the collective-bargaining agreement between the agency and the union. Under 5 U. S. C. § 7701(c)(2)(A), the Board may not sustain the agency's action if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." The Act also requires an arbitrator to apply this "harmful-error" rule in grievance and arbitration procedures under a bargaining agreement. Two employees of the General Services Administration (GSA), members of a union having a bargaining agreement with the GSA, were removed from their jobs for falsification of records and other reasons. When the employees were first interrogated about the wrongdoing, and later when they admitted it in sworn affidavits, they were not advised that they were entitled to have a union representative present. The employees also did not receive notices of proposed removal until almost three months after the wrongdoing. The employees challenged their removals under the bargaining agreement's grievance and arbitration procedures. The arbitrator, while finding that the wrongdoing normally would justify removal, also found that the GSA had committed procedural errors in violation of the bargaining agreement by failing to give the employees an opportunity to have a union representative present during interrogation and by unreasonably delaying issuance of the notices of proposed removal. The arbitrator concluded that, although the errors did not prejudice the employees, the removals were not for just cause. Accordingly, the arbitrator reduced the penalties to two weeks' suspension without pay. The Court of Appeals affirmed in substantial part, holding that although the employees were not prejudiced, the arbitrator, in making the ultimate award, could take into account significant violations of the bargaining agreement that were important to the union, because such violations were tantamount to "harmful error" to the union within the scope of § 7701(c)(2)(A). The Court of Appeals also ruled that the

reduction of the penalties was a proper means of "penalizing the agency" for disregarding the agreement's procedural protections.

Held: Under § 7701(c)(2)(A), the employee-grievant must show error that caused substantial prejudice to his individual rights by possibly affecting the agency's decision. Pp. 657–665.

(a) The Board has so interpreted § 7701(c)(2)(A) in its regulation defining "harmful error," and its interpretation is entitled to deference. To apply a different definition of "harmful error" in an arbitral context than in a Board proceeding so as to permit an arbitrator to overturn agency disciplinary action on the basis of a violation of a bargaining agreement that is harmful only to the union would directly contravene the Act's purpose of promoting consistency in resolving federal employee grievances and avoiding forum shopping. Pp. 657–662.

(b) Moreover, the "harmful-error" rule must be interpreted as the Board interprets it if the underlying purpose of the Act of maintaining an effective and efficient Government, and the particular purpose of § 7701 to give agencies greater ability to remove or discipline erring employees expeditiously, are to be carried out. The purpose of the Act of strengthening federal employee unions and making the collective-bargaining process more effective is not undermined by application of the Board's interpretation of the "harmful-error" rule in the arbitral context. Under any interpretation of the rule, unions are free to bargain for procedures to govern agency actions, and agencies must follow agreed-upon procedures. If the agency violates these procedures with prejudice to the individual employee's rights, any resulting agency disciplinary decision will be reversed. Whether or not there is prejudice to the individual employee, the union may file a grievance in its own behalf and, in the case of a clear breach of the agreement, may file an unfair labor practice charge with the Federal Labor Relations Authority. Thus, the union has adequate remedies of its own for enforcing agency compliance with the procedural requirements of the bargaining agreement. Pp. 662–665.

718 F. 2d 1048, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 666. POWELL, J., took no part in the decision of the case.

Charles A. Rothfeld argued the cause *pro hac vice* for petitioner. With him on the briefs were *Solicitor General Lee*, *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *David M. Cohen*, and *George M. Beasley III*.

Charles A. Hobbie argued the cause for respondents. With him on the brief was *Mark D. Roth.**

JUSTICE BLACKMUN delivered the opinion of the Court.

Under the Civil Service Reform Act of 1978, Pub. L. 95–454, 92 Stat. 1111, a federal employee may challenge agency disciplinary action by appealing the agency's decision to the Merit Systems Protection Board (Board). If, however, the employee is a member of a collective-bargaining unit of federal employees, he, in the alternative, may challenge the disciplinary action by pursuing any grievance and arbitration procedure provided by the collective-bargaining agreement. Neither the Board nor the arbitrator may sustain the agency's decision if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." 5 U. S. C. §7701(c)(2)(A). The Board has interpreted this statute to require the employee to show error that causes substantial prejudice to his individual rights by possibly affecting the agency's decision. This case presents the issue whether a different "harmful-error" interpretation should apply in an arbitration, or, to phrase it another way, whether the arbitrator may overturn agency disciplinary action on the basis of a significant violation of the collective-bargaining agreement that is harmful only to the *union*.

I

The 1978 Act is "a comprehensive revision of the laws governing the rights and obligations of civil servants, [and] contains the first statutory scheme governing labor relations between federal agencies and their employees." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 91 (1983). Among the major purposes of the Act were the "preser[vation of] the ability of federal managers to maintain 'an effective and efficient Government,'" *ibid.*, quoting 5 U. S. C. §7101(b), and the "strengthen[ing of] the position of

Lois G. Williams filed a brief for the National Treasury Employees Union et al. as *amici curiae* urging affirmance.

federal unions and [making] the collective-bargaining process a more effective instrument of the public interest," 464 U. S., at 107.

To promote the first of these purposes, the Act provides that a federal employee may be removed or otherwise disciplined for unacceptable performance or for misconduct. Specifically, § 4303 establishes procedures by which an agency may remove or demote an employee whose performance is unacceptable. In addition, § 7512 provides that an agency may take adverse action against an employee, including removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less, for, as § 7513 states, "such cause as will promote the efficiency of the service," including misconduct. A federal employee subjected to agency disciplinary action taken pursuant to § 4303 or § 7512 may appeal the agency's decision to the Board. §§ 4303(e), 7513(d), and 7701. The Board must sustain the agency's decision if it is supported by appropriate evidence. § 7701(c)(1).[1] The agency's decision may not be sustained, however, if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." § 7701(c)(2)(A).[2]

To promote the second of these purposes of the Act—"to strengthen the position of federal unions and to make the

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[1] Section 7701(c)(1) reads:

"Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

"(A) in the case of an action based on unacceptable performance described in section 4303 of this title, is supported by substantial evidence, or

"(B) in any other case, is supported by a preponderance of the evidence."

[2] Section 7701(c)(2) reads:

"Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

"(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

"(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

"(C) shows that the decision was not in accordance with law."

collective-bargaining process a more effective instrument of the public interest"—the Act requires federal agencies and unions representing agency employees to "negotiate over terms and conditions of employment, unless a bagaining proposal is inconsistent with existing federal law, rule, or regulation." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S., at 92. Even matters reserved to agency-management discretion, such as discipline, are subject to negotiation concerning the procedures that management officials will observe in exercising their authority. § 7106(b)(2).

The Act also requires any collective-bargaining agreement between a federal agency and a union to provide for a grievance procedure and binding arbitration for the resolution of disputes arising under the agreement. §§ 7121(a) and (b). An employee in a bargaining unit having a negotiated grievance procedure that covers agency disciplinary action taken pursuant to § 4303 or § 7512 thus may elect to challenge such action by filing a grievance rather than appealing to the Board. § 7121(e)(1). If the employee elects so to proceed, and the union or the agency invokes binding arbitration, see § 7121(b)(3)(C), the arbitrator is to apply the same substantive standards that the Board would apply if the matter had been appealed. See S. Rep. No. 95–969, p. 111 (1978); H. R. Conf. Rep. No. 95–1717, p. 157 (1978). In particular, the Act provides: "In matters covered under sections 4303 and 7512 . . . which have been raised under the negotiated grievance procedure . . . , an arbitrator shall be governed by section 7701(c)(1) . . . ." § 7121(e)(2). Section 7701(c)(1) incorporates by reference the provisions of subsection (c)(2), including the harmful-error rule. Thus, the statutory scheme mandates that the harmful-error rule is to apply whether the employee challenges the agency action through the Board or through binding arbitration.[3]

[3] Although § 7121(e)(2) explicitly refers only to § 7701(c)(1), it is clear from the language of the statute and the legislative history, discussed below, that the harmful-error rule of § 7701(c)(2)(A) is incorporated by

II

Thomas Rogers and Robert Wilson, Jr. (grievants), were employed by General Services Administration (GSA) as Federal Protective Service (FPS) officers at the Federal Center in Denver, Colo. Rogers patrolled property owned or leased by the Federal Government at various locations in the Denver metropolitan area while maintaining contact either by radio or by telephone with the Command Center. Wilson worked as a dispatcher at the Center. Everything spoken over the radio and telephone lines of the Command Center is recorded on tape. This tape constitutes the record of activity at the Center.

On January 7, 1982, Rogers was on patrol in an official Government car. At the request of his shift supervisor, he drove to his home in a nearby suburb, picked up several cans of beer, and delivered the beer to the supervisor at the Center. The supervisor later drank the beer and left the empty cans at the Center when he went off duty. The following day, the supervisor, while off duty, became concerned that the unexplained presence of empty beer cans might lead to the discovery of his drinking beer while on duty. He therefore telephoned Wilson, at the Command Center, and instructed him to alter the tape for the previous day to include a false explanation for the presence of the beer cans. Wilson complied with this request.

Subsequently, an FPS official monitoring the tapes for an unrelated reason noted irregularities in them and concluded that they had been edited. GSA's Inspector General initiated an investigation. Two special agents went to Rogers' home and asked him to accompany them to the local police station for a "noncustodial" interrogation. The agents made

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§ 7121(e)(2). See *Devine* v. *White*, 225 U. S. App. D. C. 179, 199, 697 F. 2d 421, 441 (1983). See also *Devine* v. *Brisco*, 733 F. 2d 867, 872 (CA Fed. 1984). Respondents concede that the harmful-error rule applies to an arbitration as well as to a proceeding before the Board, but they contend that the rule should be interpreted differently in the two contexts.

detailed notes of the interview. Wilson was interviewed in the same manner. Neither was advised that he was entitled to have a union representative present at the interview, and neither requested the presence of a representative.

About a month later, the agents again interviewed the two men separately and asked them to sign affidavits prepared from the agents' notes of the earlier interviews. The grievants made corrections in the proposed affidavits and then, under oath, signed them. In the affidavits, the grievants admitted their participation in the above-described incidents of wrongdoing. As before, the grievants were not advised that they were entitled to have a union representative present, and they did not request representation.

On April 2, 1982, almost three months after the incidents, GSA formally advised the grievants that it proposed to remove them from federal service. Upon receiving written responses to the charges, GSA informed Wilson that he would be removed on grounds of falsification of records and of attempting to conceal activities of record. Similarly, GSA informed Rogers that he would be removed on grounds of falsification of records, failure to report irregularities, and use of a Government vehicle for a nonofficial purpose.[4]

Both grievants elected to challenge their removal under the grievance and arbitration procedures established by the collective-bargaining agreement between GSA and their union, respondent American Federation of Government Employees. The union then invoked binding arbitration pursuant to § 7121(b)(3)(C). The arbitrator, respondent Nutt, found that the grievants had committed the alleged acts of wrongdoing and that this misconduct normally would justify the penalty of removal from Government service. The arbitrator also found, however, that GSA on its part had committed two procedural errors in violation of provisions

[4] The supervisor involved in the incident also was discharged. His discharge was upheld by the Board.

of the collective-bargaining agreement. First, GSA had failed to give the grievants an opportunity to have a union representative present during interrogation.[5] Second, GSA had permitted an unreasonable period of time to elapse between the date it first learned of the misconduct and the date it issued the notices of proposed removal.[6] The arbitrator concluded that there was no prejudice to the grievants themselves due either to the failure to have a union representative present or to the delay in the issuance of the notices. He found, nevertheless, that the removals were not for just cause "[s]olely because of the Agency's pervasive failure to comply with the due process requirements of the [collective-bargaining] agreement." App. to Pet. for Cert. 38a. He therefore reduced the penalties imposed on the grievants from removal to not less than two weeks' disciplinary suspension without pay. *Id.*, at 39a. In addition, he required that Wilson be placed in a position in which the agency would be protected from his "demonstrated proclivity to tamper with the tape recording system." *Id.*, at 38a.

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[5] Article XXVII, § 2, of the collective-bargaining agreement between GSA and the union provides:

"The Employer agrees that during formal discussion where interrogation or written or sworn statements are taken from an employee, in connection with a charge that may result in disciplinary action against him, he will have the opportunity to have a representative present. It should be understood that counseling sessions are not formal discussions." App. to Pet. for Cert. 22a.

The arbitrator interpreted this provision to require that the employee be advised of the right to representation before being investigated.

[6] Article XXVII, § 3, of the collective-bargaining agreement, as supplemented, provides in pertinent part:

"PROPOSED NOTICE: In the event an employee is issued a notice of proposed disciplinary or adverse action, that employee must be afforded and made aware of all his/her rights. These proposed notices shall be served on the employee(s) within a reasonable period of time (normally 40 calendar days) after the occurrence of the alleged offense or when the alleged offense becomes known to management." App. to Pet. for Cert. 23a.

Pursuant to §§ 7703(d) and 7121(f), the Director of the Office of Personnel Management sought review of the arbitrator's decision by the United States Court of Appeals for the Federal Circuit. See 28 U. S. C. § 1295(a)(9). The Director contended that the arbitrator had not properly applied the Act's harmful-error rule. The Court of Appeals granted the petition for review, and it was heard by a 5-judge panel. The court affirmed the arbitrator's decision in substantial part. 718 F. 2d 1048 (1983). It held that an arbitrator must apply the harmful-error standard of § 7701(c)(2)(A) in determining whether a grievant is personally prejudiced. The court noted that, in the present case, the arbitrator found that the grievants had not been personally prejudiced. Nevertheless, following what it deemed to be the lead of the decision in *Devine* v. *White*, 225 U. S. App. D. C. 179, 697 F. 2d 421 (1983),[7] the Court of Appeals went on to hold that even though the particular grievants may not themselves have been adversely affected, the arbitrator, in making the ultimate award, could take into account significant violations of the collective-bargaining agreement that were important to the union. The court reasoned: "The union is a major (if not *the* major) party to the arbitration and its proper interests are to be protected, even though the interests of the particular grievants may not, alone, call for protection" (emphasis in original). 718 F. 2d, at 1054. Here, the union and the agency agreed to procedural safeguards concerning

[7] In *Devine* v. *White*, the United States Court of Appeals for the District of Columbia Circuit held that some bargained-for procedural rights are, by definition, substantial rights *of an employee*, and that an agency's violation of those rights constitutes harmful error requiring reversal of the agency's decision even absent a showing that the violation might have affected the outcome of the decision. See 225 U. S. App. D. C., at 201, 697 F. 2d, at 443. The Court of Appeals in *Devine* v. *White* therefore did not interpret the harmful-error rule to protect the rights *of the union*, as did the Court of Appeals for the Federal Circuit in the present case. The decision in *Devine* v. *White*, however, is inconsistent with our decision today insofar as it dispenses with the requirement that harmful error have some likelihood of affecting the outcome of the agency's decision.

representation and notice, and these procedures effectively became union rights. Thus, "[v]iolations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to 'harmful error' to the union within the scope of 5 U. S. C. § 7701(c)(2)(A) (1982) for the purposes of collective bargaining arbitration in which the union is a proper party." *Id.*, at 1055. The court concluded that the arbitrator's reduction of the grievants' penalties was a proper means of "penalizing the agency" for disregarding the procedural protections of the collective-bargaining agreement.[8] *Ibid.*

Because of the importance of the issue, we granted certiorari. 469 U. S. 814 (1984).

III

A

The harmful-error rule of 5 U. S. C. § 7701(c)(2)(A) provides that an agency's decision that is appealable to the Board may not be sustained if the employee "shows harmful error in the application of the agency's procedures in arriving at such decision." Petitioner argues that "harmful error" is error that causes substantial prejudice to the rights of the individual employee by possibly affecting the agency's decision.

The Act does not define the term "harmful error,"[9] and the legislative history of § 7701(c)(2)(A) is inconclusive.[10] The

[8] The Court of Appeals, however, did not approve the arbitrator's reduction of Rogers' penalty to two weeks' suspension, since there is a statutorily imposed minimum of one month's suspension for the unauthorized operation of a Government vehicle. See 31 U. S. C. § 1349(b). It therefore ordered the imposition of a one month's suspension for Rogers. 718 F. 2d, at 1055–1056.

[9] It would be natural, however, to assume that Congress intended the term "harmful error" in § 7701(c)(2)(A) to have the same meaning that it has in the judicial context, that is, error that has some likelihood of affecting the result of the proceeding. See, *e. g.*, *United States* v. *Hasting*, 461 U. S. 499, 507–509 (1983); *Kotteakos* v. *United States*, 328 U. S. 750, 760–762 (1946).

[10] The original Senate version of the bill that became the Civil Service Reform Act of 1978 provided that "agency action shall be upheld by the

Act provides, however, that the Board "may prescribe regulations to carry out the purpose of [§ 7701]," the provision in which the harmful-error rule appears. See § 7701(j). Pursuant to this authority, the Board has promulgated a definition of "harmful error":

> "Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i. e., caused substantial harm or prejudice to his/her rights." 5 CFR § 1201.56(c)(3) (1985).[11]

Board, the administrative law judge, or the appeals officer unless—(A) the agency's procedures contained error that substantially impaired the rights of the employee." See S. Rep. No. 95–969, p. 224 (1978); see also *id.*, at 179. The Senate Report explains: "Henceforth, the Board and the courts should only reverse agency actions under the new procedures where the employee's rights under this title have been substantially prejudiced." *Id.*, at 51. See also *id.*, at 54, 64. The Senate Report does not refer directly to the application of the harmful-error rule in an arbitration. The Report, however, does state that in "the negotiated grievance procedure an arbitrator must apply the same standards in deciding the case as would be applied . . . if the case had been appealed through the appellate procedures of 5 U. S. C. section 7701." *Id.*, at 111. Thus, it is clear that the Senate version of the harmful-error rule focused on the rights of the employee and did not suggest affirmatively that the Board or an arbitrator could take into account the rights of the union.

The Conference Committee did not adopt the Senate version. Petitioner points out that the Joint Explanatory Statement of the Committee on Conference, which explained "the effect of the major actions agreed upon by the managers" of the two bodies, H. R. Conf. Rep. No. 95–1717, p. 127 (1978), did not note that any substantive change in meaning was intended by the change in language. We decline, however, to infer congressional intent to adopt the substance of the Senate version solely on the basis of this legislative silence.

[11] Similarly, in *Parker* v. *Defense Logistics Agency*, 1 M. S. P. B. 489, 493 (1980), the Board explained:

"Unless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial . . . . Stated another way, the question is

The agency's "procedures" considered by the Board in applying § 7701(c)(2)(A) include not only procedures required by statute, rule, or regulation,[12] but also procedures required by a collective-bargaining agreement between the agency and a union.[13] Thus, in an appeal of an agency disciplinary decision to the Board, the agency's failure to follow bargained-for procedures may result in its action's being overturned, but only if the failure might have affected the result of the agency's decision to take the disciplinary action against the individual employee. At least insofar as it applies to proceedings before the Board, this interpretation of the harmful-error rule is entitled to substantial deference.[14] See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844 (1984).

Respondents do not dispute the correctness of the Board's definition of harmful error insofar as it applies to proceedings before the Board. Respondents argue, however, that an arbitral proceeding differs significantly from a Board proceeding, and that a different definition of harmful error should apply in the arbitral context. Respondents point out that an appeal to the Board is taken solely by the employee or

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whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency."

See also, *e. g.*, *Davies* v. *Department of the Navy*, 4 M. S. P. B. 83, 85 (1980); *Fuiava* v. *Department of Justice*, 3 M. S. P. B. 217, 218 (1980).

[12] See, *e. g.*, *Parker* v. *Defense Logistics Agency*, 1 M. S. P. B., at 492–496.

[13] See, *e. g.*, *Stalkfleet* v. *United States Postal Service*, 6 M. S. P. B. 536, 537 (1981); *Battaglia* v. *Department of Health and Human Services*, 5 M. S. P. B. 212 (1981); *Giesler* v. *Department of Transportation*, 3 M. S. P. B. 367, 368–369 (1980), aff'd, 686 F. 2d 844 (CA10 1982).

[14] The United States Court of Appeals for the Federal Circuit has approved the Board's construction of the harmful-error rule as applied in proceedings before the Board. See, *e. g.*, *Miguel* v. *Department of the Army*, 727 F. 2d 1081, 1084–1086 (1984); *Cheney* v. *Department of Justice*, 720 F. 2d 1280, 1285 (1983); *Shaw* v. *United States Postal Service*, 697 F. 2d 1078, 1080–1081 (1983).

applicant for employment, see 5 U. S. C. § 7701(a), and that the union has no statutory role in a Board proceeding. In contrast, according to respondents, the union should be considered to be a major party in an arbitration. The union and the agency negotiate the grievance procedures and the terms of the collective-bargaining agreement establishing the extent of the arbitrator's authority. The union and the agency possess the exclusive power to invoke the arbitral process, and these parties jointly select an acceptable arbitrator.[15] Thus, according to respondents, while the Board must focus exclusively on the rights of the individual employee, the arbitrator should take a broader view and consider the rights of the union as well. Respondents contend that the Court of Appeals therefore correctly held that "the arbitrator can take account of significant violations of the collective bargaining agreement, important to the union, even though the particular grievants may not have been themselves adversely affected." 718 F. 2d, at 1054.

We are not persuaded by respondents' arguments. Congress clearly intended that an arbitrator would apply the same substantive rules as the Board does in reviewing an agency disciplinary decision. Section 7121(e)(2) provides that in matters involving agency discipline "which have been raised under the negotiated grievance procedure . . . , an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable." Section 7701(c)(1) incorporates by reference the harmful-error rule of § 7701(c)(2)(A). The Senate Report explains that, under this provision, "if an employee exercises the option to pursue a matter [involving agency discipline]

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[15] On the other hand, it is the employee who makes the initial election whether to use the negotiated grievance procedure at all, see 5 U. S. C. § 7121(e)(1), and who elects whether to seek judicial review of the arbitrator's decision, see §§ 7121(f), 7703(a)(1). Also, by the plain terms of § 7701(c)(2)(A), it is the employee who bears the burden of showing harmful error.

through the negotiated grievance procedure an arbitrator must apply the same standards in deciding the case as would be applied by an administrative law judge or an appeals officer if the case had been appealed through the appellate procedures of 5 U. S. C. section 7701." S. Rep. No. 95–969, p. 111 (1978). The version of the bill passed by the House did not contain a similar provision. The Conference Committee noted that, under the Senate provision, "when considering a grievance involving an adverse action otherwise appealable to the [Board] . . . the arbitrator must follow the same rules governing burden of proof and standard of proof that govern adverse actions before the Board." H. R. Conf. Rep. No. 95–1717, p. 157 (1978). The Conference Committee "adopted the Senate provision in order to promote consistency in the resolution of these issues, and to avoid forum shopping."[16] *Ibid.*

Adoption of respondents' interpretation of the harmful-error rule in the context of an arbitral proceeding would directly contravene this clear congressional intent. An employee who elects to appeal an agency disciplinary decision to the Board must prove that any procedural errors substantially prejudiced his rights by possibly affecting the agency's decision. Under respondents' interpretation, however, an employee who elects to use the grievance and arbitration procedures may obtain reversal merely by showing that significant violations of the collective-bargaining agreement, harmful to the union, occurred. In the present case, if the disciplined employees had elected to appeal to the Board, their discharges would have been sustained by the Board under its interpretation of the harmful-error rule. Because,

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[16] In addition, Congress made arbitral decisions subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the Board," 5 U. S. C. § 7121(f), expressly "to assure conformity between the decisions of arbitrators with those of the Merit Systems Protection Board." S. Rep. No. 95–969, p. 111 (1978).

however, they pursued the negotiated grievance and arbitration procedures, they benefited from the different interpretation of the harmful-error rule advocated by respondents and applied by the arbitrator and the Court of Appeals, and their discharges were replaced with brief suspensions. If respondents' interpretation of the harmful-error rule as applied in the arbitral context were to be sustained, an employee with a claim that the agency violated procedures guaranteed by the collective-bargaining agreement would tend to select the forum—the grievance and arbitration procedures—that treats his claim more favorably. The result would be the very inconsistency and forum shopping that Congress sought to avoid.

B

We, however, do not rest our decision solely on deference to the Board's interpretation of the harmful-error rule and on the clear congressional intent that an arbitrator apply the same substantive standards as does the Board. Rather, we rest our decision ultimately on the conclusion that we must interpret the harmful-error rule as does the Board if we are "'to remain faithful to the central congressional purposes underlying the enactment of the CSRA.'" *Lindahl* v. *Office of Personnel Management*, 470 U. S. 768, 794 (1985), quoting *Devine* v. *White*, 225 U. S. App. D. C., at 183, 697 F. 2d, at 425. As noted above, one of the major purposes of the Act was to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S., at 92, quoting 5 U. S. C. § 7101(b). In order to achieve this purpose, one of the "central tasks" of the Act was to "[a]llow civil servants to be able to be hired and fired more easily, but for the right reasons." S. Rep. No. 95–969, p. 4 (1978). In particular, the provisions of § 7701 of the Act, including the harmful-error rule, were intended "to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is un-

acceptable." *Id.*, at 51.[17] In the present case, the grievants concededly committed improper acts that justified their removal from the federal service. Although the agency committed procedural errors, those errors do not cast doubt upon the reliability of the agency's factfinding or decision. We do not believe that Congress intended to force the Government to retain these erring employees solely in order to "penalize the agency" for nonprejudicial procedural mistakes it committed while attempting to carry out the congressional purpose of maintaining an effective and efficient Government.

Respondents argue, however, that penalizing the Government in this manner is necessary in order to enforce the procedures arrived at through collective bargaining, and thus to promote a second major purpose of the Civil Service Reform Act—"to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S., at 107. Respondents contend that if harmful error must be shown in the sense that an employee's own case is prejudiced, then the procedures arrived at through collective bargaining really become meaningless. We find this concern overstated. Under any interpretation of the harmful-error rule, unions are free to bargain for procedures to govern agency action, see §§ 7106 (b)(2) and (3), and agencies are obligated to follow the agreed-upon procedures. If the agency violates those procedures with prejudice to the individual employee's rights, any resulting agency disciplinary decision will be reversed by the Board or by an arbitrator.

Even if the violation is not prejudicial to the individual employee, the union is not without remedy. The Act per-

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[17] See also S. Rep. No. 95–969, p. 52 (1978) (provisions of § 7701 intended "to eliminate unwarranted reversals of agency actions"); *id.*, at 54 (provisions of § 7701 intended to "avoid unnecessary reversal of agency actions because of technical procedural oversights").

mits the union to file a grievance on its own behalf. § 7121 (b)(3)(A). The Act broadly defines "grievance" to include "any complaint . . . by any employee labor organization . . . concerning . . . the effect or interpretation, or a claim of breach, of a collective bargaining agreement." § 7103(a)(9)(C)(i). This statutory authorization clearly permits the union to file a grievance alleging a violation of the procedural requirements established in the collective-bargaining agreement.[18] The arbitrator can remedy such violation by ordering the agency to "cease and desist" from any further such violation. In addition, if the violation constitutes "a clear and patent breach of the terms of the agreement," *Iowa National Guard and National Guard Bureau*, 8 F. L. R. A. 500, 510 (1982), the union may file an unfair labor practice charge with the Federal Labor Relations Authority.[19] See

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[18] Respondents argue that requiring the union separately to file a grievance and invoke arbitration in order to enforce its own rights would result in duplicative proceedings. There is, however, no reason why, if the union's institutional grievance and the employee's individual grievance arise from the same factual situation, the two grievances cannot be consolidated by the arbitrator. The only constraint is that, under the harmful-error rule, the arbitrator may not give the employee a windfall by reversing the agency's decision to discipline the employee in order to penalize the agency for violating rights of the union, whenever the violation had no effect on the agency's decision.

[19] In the present case, the union did file an unfair labor practice charge with the Authority. It alleged that "on February 4, 1982, agents of the General Services Administration (GSA) patently breached the applicable collective bargaining agreement by failing to advise unit employees during an interrogation of their right to have a Union representative present." App. to Reply Memorandum for Petitioner 4a. The Acting Regional Director found that it was not clear whether the collective-bargaining agreement required the agency to advise unit employees being interrogated of their right to union representation. She therefore concluded that "the dispute in this case involves differing and arguable interpretations of the contracts' intent and meanings, and should therefore appropriately be resolved through the parties' negotiated grievance/arbitration procedures,

§§ 7116[20] and 7118. Our holding today therefore does not prevent the union from obtaining a binding interpretation of a disputed provision of the collective-bargaining agreement or from enforcing agency compliance with that provision. We hold only that the means of compelling compliance do not include forcing the agency to retain an employee who is reliably determined to be unfit for federal service.

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

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rather than in the unfair labor practice forum." *Id.*, at 6a. In a case such as this where the meaning of the contract is unclear, the union need only obtain a favorable construction of the contract and an appropriate cease-and-desist order by filing a grievance and invoking arbitration. Any subsequent violation by the agency would then provide a basis for an unfair labor practice charge.

[20] Respondents suggest that § 7116(d) precludes the union from filing an unfair labor practice charge when, as in the present case, an employee initiates a grievance procedure or appeal to the Board based on the same factual situation. Section 7116(d) states:

"Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures."

This section provides only that the same aggrieved party cannot raise identical issues under an appeal or grievance procedure and also as an unfair labor practice. It does not preclude a union in its institutional capacity as an aggrieved party from filing an unfair labor practice charge to enforce its own independent rights merely because an employee has initiated an appeal or grievance procedure, based on the same factual situation, to enforce his individual rights. See *Internal Revenue Service, Western Region*, 9 F. L. R. A. 480, 480–481, n. 2 (1982); *United States Air Force*, 4 F. L. R. A. 512, 527 (1980).

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court holds that the Civil Service Reform Act of 1978 requires that an arbitrator, when reviewing an agency disciplinary action taken in violation of collectively bargained procedures, must ignore the possibility that sustaining the adverse action would be injurious to the legitimate interests of the union and to the integrity of the collective-bargaining process. Following Congress' finding that healthy collective bargaining serves the effective conduct of Government business, I agree with the Court of Appeals that an arbitrator may properly take into account in reviewing an adverse action a procedural error that substantially injures the union's collective-bargaining role. Accordingly, I dissent.

I

In passing the Civil Service Reform Act of 1978, Pub. L. 95–454, 92 Stat. 1111, Congress declared that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U. S. C. § 7101(a). This finding was based on Congress' study of "experience in both public and private employment," *ibid.*, and on its conclusion that employees' right to "bargain collectively, and participate through labor organizations . . . in decisions which affect them . . . contributes to the effective conduct of public business." *Ibid.* One of the major goals of the Act was to effectuate this policy by establishing the framework for a system of labor organization and collective bargaining in the federal civil service. See 5 U. S. C. § 7101 *et seq.* One of the principal spheres where collective-bargaining rights were guaranteed to federal unions was the negotiation of "procedures *which management officials of the agency will observe*" in taking disciplinary actions against employees. § 7106(b)(2) (emphasis added). Congress also required that collective-bargaining agreements covering federal employees

must provide for grievance procedures that include union-invoked "binding arbitration." § 7121(b)(3)(C).

This case involves the arbitration of agency decisions to remove from Government service two Federal Protective Service officers. Both officers were accused of serious acts of misconduct. The arbitrator determined that they "committed the acts enumerated" and that "under normal circumstances [those acts would] justify their removal from government service." App. to Pet. for Cert. 32a. But the arbitrator also found that the agency's behavior in reaching its decision to remove the grievants was plagued by a "pervasive failure to comply with the due process requirements of the [collective-bargaining] agreement." *Id.*, at 38a. Among other violations of the contractual procedures, the agency had repeatedly failed to inform either grievant of his right to have a union representative present during all investigatory interviews. The officers' collective-bargaining agreement and a prior arbitration decision unambiguously established both the right to union representation and the right to be informed by the employer of the availability of union representation. Although the arbitrator concluded that it would be "unrealistic to pretend that the Grievants . . . were entirely unaware of their right to representation," *id.*, at 34a–35a, he also concluded that some modification of the agency action was necessary to avoid denigration of the collectively bargained procedural requirements.

In the Court's view, this decision violated the Act's requirement that an employee complaining of procedural errors associated with an adverse action decision must "sho[w] harmful error in the application of the agency's procedures in arriving at such decision." § 7701(c)(2)(A). The Court rejects the position of the Court of Appeals for the Federal Circuit, under which an arbitrator's finding of a significant injury *to the union* stemming from the agency's "[v]iolations of explicit and important procedural rights contained in a contract," 718 F. 2d 1048, 1055 (1983), constitutes "harmful

error." Instead, the Court holds that the harmful-error standard prohibits consideration of any violation that did not affect "the result of the agency's decision to take the disciplinary action against the individual employee." *Ante*, at 659. But neither the wording of the standard offered by the Court today, nor the statutory language and history, require that arbitrators ignore the possibility that sustaining an agency action may—because of an agency's refusal to honor contractual obligations in reaching its disciplinary decisions—result in substantial injury to the continued stability of union-agency collective-bargaining relations. By requiring the arbitrator to ignore this factor, the Court undermines the clear congressional intent to gain for the federal sector the benefits derived from a system of stable collective bargaining.

II

The Court analyzes the concept of "harmful error" in an adverse action case as it would in the context of a criminal trial.[1] Similarly, it narrowly defines the issue before the arbitrator as whether the grievants had in fact committed the acts of misconduct of which they were accused. But by statutory mandate the issue before an arbitrator in an adverse action case is not simply whether the grievants have committed the alleged acts of misconduct; it is rather whether the grievants' removal from the service was for "such cause as will promote the efficiency of the service." § 7513(a). This flexible statutory standard easily encompasses Congress' desire to assure that stable collective-bargaining relationships be established in agencies,[2] and accordingly, the con-

[1] See *ante*, at 657, n. 9 ("assum[ing] that Congress intended the term 'harmful error' . . . to have the same meaning that it has in the judicial context" and citing two criminal cases, *United States* v. *Hasting*, 461 U. S. 499, 507–509 (1983) and *Kotteakos* v. *United States*, 328 U. S. 750, 760–762 (1946), for the proper standard). But see n. 2, *infra*.

[2] Cf. *Kotteakos* v. *United States*, *supra*, at 760–762 (in evaluating what is harmful error, "[w]hat may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another").

cern for stable collective-bargaining relationships is relevant to the statutory concept of harmful error.[3]

The statutory phrase "such cause as will promote the efficiency of the service" predates the Civil Service Reform Act's recognition of federal sector collective bargaining. See *Arnett* v. *Kennedy*, 416 U. S. 134, 158–164 (1974) (plurality opinion) (discussing history of phrase). Nonetheless it has always been understood as an "admittedly general standard," *id.*, at 159, adaptable to the situations faced by "myriad different federal employees performing widely disparate tasks." *Ibid.* It was certainly meant to leave room for Congress' evolving conceptions of what constitutes efficient public management. A plurality of this Court has previously explained that "longstanding principles of employer-employee relationships, like those developed in the private sector, should be followed in interpreting the [standard]," *id.*, at 160, and this point takes on special importance in light of Congress' decision that success of collective bargaining in the private sector should to some extent serve as an example for the federal workplace. But whether one looks to the concept of "just cause" that has developed in the unionized private sector or confines the inquiry to the findings made by Congress upon

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[3] The court below was not alone in recognizing the relevance to the "harmful error" standard of Congress' concern for healthy and stable collective bargaining. This recognition was also at the heart of the Court of Appeals for the District of Columbia Circuit opinion in *Devine* v. *White*, 225 U. S. App. D. C. 179, 697 F. 2d 421 (1983). Writing for that court, Judge Edwards concluded that "a violation of a clear provision of a collective bargaining agreement could constitute 'harmful error' under the theory that some bargained-for procedural rights are, by definition, substantial rights of an employee." *Id.*, at 201, 697 F. 2d, at 443. Judge Edwards argued that employees' participation in the collective-bargaining process to obtain certain rights reflects that those employees have "attached considerable importance" to those rights. To allow agency decisions to stand, even if they are made in clear violation of these "substantial rights of an employee," "would . . . be inconsistent with Congress' desire to ensure that the federal government, as well as the private sector, receiv[e] the benefits that flow from collective bargaining." *Ibid.*

passage of the Civil Service Reform Act, the arbitrator's consideration of collective-bargaining concerns in his evaluation of "cause" was proper.[4]

III

The Court's discussion of harmful error leaves unanalyzed the public interest in collective bargaining and thus fails to consider whether that interest should be taken into account in the analysis of what constitutes "such cause as will promote the efficiency of the service." § 7513(a). Instead it principally rests on the fact that "one of the 'central tasks' of the Act was to '[a]llow civil servants to be able to be hired and fired more easily.'" *Ante*, at 662 (quoting S. Rep. No. 95–969, p. 4 (1978)).

The Court reasons that because the grievants in this case had "concededly committed improper acts that justified their removal from the federal service," *ibid.*, it would defeat a major purpose of the Act to force their reinstatement because of procedural errors that "do not cast doubt upon the reliability of the agency's factfinding or decision."

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[4] Arbitrator Nutt rested his decision to modify the adverse actions on the accepted practice of arbitrators interpreting the "just cause" standard. See App. to Pet. for Cert. 36a. ("This approach has been taken by most arbitrators and will most likely assure the Agency's making certain that the contract is followed in the future"). It is clear that his approach does conform to generally accepted arbitration practice. See, *e. g.*, *General Telephone Co.*, 78 Lab. Arb. 793 (1982); *City of Sterling Heights*, 80 Lab. Arb. 825 (1983) (local government public sector arbitration); *Fort Wayne Community Schools*, 78 Lab. Arb. 928 (1982) (same). See generally F. Elkouri & E. Elkouri, How Arbitration Works 633, and n. 110 (3d ed. 1973) (collecting citations to published opinions of labor arbitrators).

Although arbitrators have sustained disciplinary actions in spite of management's failure to follow bargained-for procedures, these cases usually rested not only on the absence of prejudice to the grievant, but also on the principle that "compliance with the spirit of . . . procedural requirements [may be] held to suffice." *Id.*, at 634. The instant case, however, involves an agency that made little effort to comply with either the letter or the spirit of the agreement.

Ibid. But the agency's decision that removal of these employees would serve the "efficiency of the service" included no consideration of the possible injuries to collective bargaining caused by the serious procedural errors committed by the agency. Given Congress' determination that stable collective-bargaining relationships would serve "the effective conduct of public business," § 7101(a), it cannot be so quickly said that the errors involved in this case "do not cast doubt upon the reliability of the agency's . . . decision." If one takes Congress' determination seriously, then the agency's decision is indeed called into question.[5]

It is true that facilitating collective bargaining was not the only goal of the Act, and that Congress also intended to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government,'" *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 92 (1983) (quoting 5 U. S. C. § 7101(b)), and to "'[a]llow civil servants to be able to be hired and fired more easily.'" *Ante*, at 662 (quoting S. Rep. No. 95–969, p. 4 (1978)). These concerns certainly influenced many aspects of Congress' detailed statutory scheme for the governance of the civil service. Indeed, Congress explicitly reserved as "management rights"

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[5] Given the fact that an agency's decision is supposed to reflect a determination that an adverse action serves the "efficiency of the service," I do not believe that the definition of "harmful error" actually offered by the Court or at various times by the Merit Systems Protections Board, see *ante*, at 659, necessarily demands that an arbitrator ignore injuries to the collective-bargaining process. The issue is whether those injuries can be taken into account in determining "cause."

Moreover, it is not surprising that the MSPB's definition does not explicitly mention concerns regarding collective bargaining, because unlike arbitration cases, MSPB cases are brought by individual employees rather than by unions. The MSPB's definition reflects a failure to have considered issues of collective bargaining more than it reflects a considered determination of the issues presented here. It is thus not surprising that the Court chooses not to rest its decision primarily on grounds other than deference to the MSPB. *Ante*, at 662–665.

the authority "to suspend, remove, reduce in grade or pay, or take other disciplinary action against . . . employees." § 7106(a)(2)(A). But Congress also explicitly provided for collective bargaining to establish procedures that "the agency will observe in exercising [its] authority" in this area, § 7106(b)(2), and the legislative history of this provision makes clear that Congress well understood that bargained-for procedures could severely limit management's freedom of action over discipline.[6]

While the Court underemphasizes the importance of collective bargaining, it overemphasizes the harm to the service of allowing the arbitrator's decision to stand. The issue is not whether common and trivial procedural errors will be a reason for putting clearly unfit people back in positions where they will do harm; this case involves neither a common nor a trivial procedural error, and the arbitrator established no requirement that an employee be returned to a position where he will do harm.

The arbitrator found the violations of the agreement "pervasive," App. to Pet. for Cert. 38a, and it was only on that basis that the Court of Appeals affirmed. The concept of

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[6]The legislative language and history makes clear that Congress took quite seriously the rights of unions to negotiate procedures binding on agencies regarding those agencies' exercise of management authority. One of the floor managers of the bill, explaining this provision as it emerged from the Conference Committee, stressed that under "the clear language of the bill itself, any exercise of the enumerated management rights [such as the right to discipline employees] is conditioned upon the full negotiation of arrangements regarding adverse effects and procedures." 124 Cong. Rec. 38715 (1978) (comments of Rep. Ford). He stressed that contract proposals were fully valid even if they had "[a]n indirect or secondary impact on a management right," *ibid.*, and that "procedures and arrangements are to be negotiated with regard to both the decisionmaking and implementation phases of any exercise of management authority." *Ibid.* The Conference Report went so far as to acknowledge that the right to negotiate on procedures regarding the exercise of management rights gives the parties the ability to "indirectly do what the [management rights] section prohibits them from doing directly." H. R. Conf. Rep. No. 95–1717, p. 158 (1978).

harmful error was not written out of the statute in this case, for the Court of Appeals concluded that "violations of explicit and important procedural rights contained in a contract, such as these, could fairly be said to be tantamount to 'harmful error' to the union." 718 F. 2d, at 1055. Under this standard, an arbitrator would certainly be prohibited from reversing an agency's adverse actions because of technical contract violations not serious enough to injure the collective-bargaining process. See *Devine* v. *Brisco*, 733 F. 2d 867 (CA Fed. 1984) (reversing an arbitrator's refusal to sustain an agency determination because of procedural errors that were not shown seriously to compromise the union's position).

Moreover, Government agencies will, it is hoped, not frequently commit flagrant violations of their collective-bargaining agreements. Thus, the burden of decisions like that of arbitrator Nutt will not be great. To the extent that a Government agency perceives a need for greater flexibility, it can seek that freedom through the congressionally sanctioned means—the collective-bargaining process. See *Devine* v. *White*, 225 U. S. App. D. C. 179, 201, 697 F. 2d 421, 443 (1983) ("Within the areas in which bargaining is permissible, we believe, as did Congress, that government managers are competent to look out for the government's interests").

Lastly, the arbitrator here did not simply ignore the agency's interest by ordering the return of an unqualified grievant to his old position. Instead, because the arbitrator agreed that one of the grieving employees could not be trusted to perform adequately at his old position, he gave the agency substantial flexibility in determining the capacity to which the employee would be reinstated. App. to Pet. for Cert. 38a–39a (allowing agency to reinstate grievant Wilson to any nonclerical position in which "he can reasonably be expected to perform satisfactorily" even if that position would be at the entrance level).

The Court is wrong to fear that it will undermine Government's efficiency to follow the unionized private sector and

incorporate concerns for the stability of collective bargaining into the evaluation of agency disciplinary actions. Giving force to Congress' view that healthy collective-bargaining relationships serve the effective conduct of public business does not displace the importance of maintaining the "efficiency of the service." To the extent that an arbitrator's decision ignores efficiency concerns, I do not doubt that it would be invalid. In formulating the "harmful error" standard, Congress understood that there would be instances where adverse actions would not serve the public interest even if in the abstract the misconduct rendered the employees deserving of the disciplinary action.[7]

IV

By determining that collective bargaining in the federal work force was in the public interest, Congress may have made the concept of "cause as will promote the efficiency of the service" slightly more complex. But it understood that this complexity has long been a part of the successful operation of collective bargaining.

Accordingly, I dissent.

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[7] See n. 6, *supra*, and accompanying text.

UNITED STATES *v.* ALBERTINI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–1624. Argued April 15, 1985—Decided June 24, 1985

Title 18 U. S. C. § 1382 makes it unlawful to reenter a military base after having been "ordered not to reenter by any officer in command or charge thereof." In 1972, respondent received from the commanding officer of Hickam Air Force Base in Hawaii a letter (bar letter) forbidding him to reenter the base without written permission from the commanding officer or his designate. The letter was issued after respondent and a companion entered the base and destroyed Government property. In 1981, respondent, with some friends, entered Hickam again during the base's annual open house for Armed Forces Day. Respondent's companions engaged in a peaceful demonstration criticizing the nuclear arms race, but respondent only took photographs of the displays at the open house and did not disrupt the activities there. The commanding officer directed the chief of the security police to have the individuals cease their demonstration and further informed him that he believed one of the individuals involved had been barred from Hickam. Respondent and his companions were escorted off the base, and respondent was subsequently convicted in Federal District Court of violating § 1382. The Court of Appeals reversed, holding that respondent had a First Amendment right to enter Hickam during the open house because the base had been transformed into a temporary public forum.

Held:

1. Section 1382 applies to respondent's conduct. Viewed in light of the ordinary meaning of the statutory language, respondent violated § 1382 when he reentered Hickam in 1981. Moreover, § 1382's legislative history and its purpose of protecting Government property in relation to the national defense support the statute's application to respondent. There is no merit to respondent's contentions that § 1382 does not allow indefinite exclusion from a military base, but instead applies only to reentry that occurs within some "reasonable" period of time after a person's ejection; that § 1382 does not apply when a military base is open to the general public for purposes of attending an open house; and that reentry is unlawful under § 1382 only if a person knows that his conduct violates an extant order not to return, whereas respondent did not subjectively believe that his attendance at the open house was contrary to a valid order barring reentry. And the assertion that respondent lacked

notice that his reentry was prohibited is implausible, since the bar letter did not indicate that it applied only when public access to Hickam was restricted, and any uncertainty he had in this regard might have been eliminated had he sought, in accord with the bar letter, permission to reenter from the commanding officer. Pp. 679–684.

2. The Court of Appeals erred in holding that the First Amendment bars respondent's conviction for violating § 1382 by his reentry during the open house. *Flower* v. *United States*, 407 U. S. 197, distinguished. A military base generally is not a public forum, and Hickam did not become a public forum merely because the base was used to communicate ideas or information during the open house. Moreover, regardless of whether Hickam constituted a public forum on the day of the open house, respondent's exclusion did not violate the First Amendment. The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable ground for excluding him from the base. Nor does the general exclusion of recipients of bar letters from military open houses violate the First Amendment on the asserted ground that such exclusion is greater than is essential to the furtherance of Government interests in the security of military installations. Exclusion of holders of bar letters in such circumstances promotes an important Government interest in assuring the security of military installations. Nothing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house. Pp. 684–690.

3. Since the Court of Appeals did not address whether, on the facts of this case, application of the 1972 bar letter to respondent was so patently arbitrary as to violate due process, this Court does not decide that issue. P. 690.

710 F. 2d 1410, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 691.

David A. Strauss argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Wallace*, *John F. De Pue*, and *Major Robert T. Lee*.

Charles S. Sims argued the cause for respondent. With him on the brief were *Burt Neuborne*, *William A. Harrison*, and *Yvonne Chotzen*.

JUSTICE O'CONNOR delivered the opinion of the Court.

The question presented is whether respondent may be convicted for violating 18 U. S. C. § 1382, which makes it unlawful to reenter a military base after having been barred by the commanding officer. Respondent attended an open house at a military base some nine years after the commanding officer ordered him not to reenter without written permission. The Court of Appeals for the Ninth Circuit held that respondent could not be convicted for violating § 1382 because he had a First Amendment right to enter the military base during the open house. 710 F. 2d 1410 (1983). We granted certiorari, 469 U. S. 1071 (1984), and we now reverse.

I

The events underlying this case date from 1972, when respondent and a companion entered Hickam Air Force Base (Hickam) in Hawaii ostensibly to present a letter to the commanding officer. Instead, they obtained access to secret Air Force documents and destroyed the documents by pouring animal blood on them. For these acts, respondent was convicted of conspiracy to injure Government property in violation of 18 U. S. C. §§ 371, 1361. Respondent also received a "bar letter" from the Commander of Hickam informing him that he was forbidden to "reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry." App. 43; cf. *Greer* v. *Spock*, 424 U. S. 828, 838 (1976). The bar letter directed respondent to 18 U. S. C. § 1382 and quoted the statute, which provides:

> "Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard Reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or
>
> "Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installa-

tion, after having been removed therefrom or ordered not to reenter by any officer in command or charge thereof—

"Shall be fined not more than $500 or imprisoned not more than six months, or both."

In subsequent years, respondent, according to his own testimony, received bar letters from a number of military bases in Hawaii. App. 30. In March 1981, he and eight companions improperly entered the Nuclear War Policy and Plans Office at Camp Smith in Hawaii and defaced Government property. *Ibid.* Respondent testified that he was not prosecuted for what he termed his "rather serious clear-cut case" of civil disobedience at Camp Smith, *ibid.*, and that the 1972 bar letter was the only one he had ever received for Hickam. *Id.*, at 28, 30.

Respondent entered Hickam again on May 16, 1981, during the base's annual open house for Armed Forces Day. On that day, members of the public, who ordinarily can enter Hickam only with permission, are allowed to enter portions of the base to view displays of aircraft and other military equipment and to enjoy entertainment provided by military and nonmilitary performers. Press releases issued by the base declared that "[w]hile Hickam is normally a closed base, the gates will be open to the public for this 32nd Annual Armed Forces Day Open House." *Id.*, at 45. Radio announcements similarly proclaimed that "the public is invited and it's all free." *Id.*, at 48.

With four friends, respondent attended the open house in order to engage in a peaceful demonstration criticizing the nuclear arms race. *Id.*, at 27–28. His companions gathered in front of a B–52 bomber display, unfurled a banner reading "Carnival of Death," and passed out leaflets. Respondent took photographs of the displays and did not disrupt the activities of the open house. The Commander of Hickam summoned Major Jones, the Chief of Security Police at the

base, and told him to have the individuals cease their demonstration. *Id.*, at 9. Before respondent was approached by military police, the Commander further informed Major Jones that he believed one of the individuals involved in the demonstration had been barred from Hickam. *Id.*, at 9–10, 13–14. Respondent and his companions were apprehended and escorted off the base.

An information filed on July 1, 1981, charged respondent with violating § 1382 because on May 16, 1981, he "unlawfully and knowingly" reentered Hickam Air Force Base "after [he] had previously been ordered not to reenter by an officer in command." *Id.*, at 3. Respondent was convicted after a bench trial and sentenced to three months' imprisonment. *Id.*, at 1. On appeal, respondent challenged his conviction on three grounds. 710 F. 2d, at 1413. First, he argued that he had written permission to reenter based on the advertisements inviting the public to attend the open house. Second, respondent contended that the 9-year-old bar letter was ineffective because it violated due process. Finally, he argued that his presence at Hickam during the open house was protected by the First Amendment. The Court of Appeals rejected respondent's first argument and found it unnecessary to consider the due process arguments. *Id.*, at 1413, 1417. The conviction must be reversed, the Court of Appeals held, because Hickam had been transformed into a temporary public forum during the open house, and the military could not exclude respondent from such a forum. *Id.*, at 1417.

II

In the order granting certiorari, this Court asked the parties to address the additional question "[w]hether the respondent's attendance at the 'open house' at Hickam Air Force Base on May 16, 1981, was the kind of reentry that Congress intended to prohibit in 18 U. S. C. § 1382." 469 U. S., at 1071. Although this issue was not raised by the

parties or passed upon by the Court of Appeals, we address it to "'ascertain whether a construction of the statute is fairly possible by which the [constititutional] question may be avoided.'" *United States* v. *Grace*, 461 U. S. 171, 175–176 (1983), quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language. *Garcia* v. *United States*, 469 U. S. 70, 75 (1984); *United States* v. *Turkette*, 452 U. S. 576, 580 (1981). "[O]nly the most extraordinary showing of contrary intentions" in the legislative history will justify a departure from that language. *Garcia*, *supra*, at 75. This proposition is not altered simply because application of a statute is challenged on constitutional grounds. Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. *Heckler* v. *Mathews*, 465 U. S. 728, 741–742 (1984). Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution. *United States* v. *Locke*, 471 U. S. 84, 95–96 (1985). Proper respect for those powers implies that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly* v. *Dollar Park and Fly, Inc.*, 469 U. S. 189, 194 (1985).

Turning to the statute involved here, we conclude that § 1382 applies to respondent's conduct. The relevant portion of the statute makes it unlawful for a person to reenter a military base after having been ordered not to do so by the commanding officer. Unless the statutory language is to be emptied of its ordinary meaning, respondent violated the terms of § 1382 when he reentered Hickam in 1981 contrary to the bar letter. Respondent, however, argues that § 1382 does not apply to his attendance at the open house for three

reasons. First, he contends that § 1382 does not allow indefinite exclusion from a military base, but instead applies only when a person has reentered "within a reasonable period of time after being ejected." Brief for Respondent 10. Second, respondent maintains that Congress did not intend § 1382 to apply when a military base is opened to the general public for purposes of attending an open house. Respondent finally argues that reentry is unlawful under § 1382 only if a person knows that his conduct violates an extant order not to return. None of these arguments is persuasive.

The legislative history of § 1382, although sparse, fully supports application of the statute to respondent. The statute was enacted in virtually its present form as part of a general revision and codification of the federal penal laws. Act of Mar. 4, 1909, ch. 321, § 45, 35 Stat. 1097. Both the War Department and the Department of Justice supported the statute as an extension of existing prohibitions on sabotage. The congressional Reports explained:

> "[I]t . . . is designed to punish persons who, having been ejected from a fort, reservation, etc., return for the purpose of obtaining information respecting the strength, etc., of the fort, etc., or for the purpose of inducing the men to visit saloons, dives, and similar places. Such persons may now go upon forts and reservations repeatedly for such purposes and there is no law to punish them." S. Rep. No. 10, 60th Cong., 1st Sess., pt. 1, p. 16 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess., pt. 1, p. 16 (1908).

The congressional Reports, as well as the floor debates, 42 Cong. Rec. 689 (1908) (remarks of Reps. Moon and Williams), indicate that the primary purpose of § 1382 was to punish spies and panderers for repeated entry into military installations. Nonetheless, § 1382 by its terms is not limited to such persons, and such a restrictive reading of the statute would frustrate its more general purpose of "protect[ing] the prop-

erty of the Government so far as it relates to the national defense." 42 Cong. Rec. 689 (1908) (remarks of Reps. Moon and Payne). One need hardly strain to conclude that this purpose is furthered by applying § 1382 to respondent, who has repeatedly entered military installations unlawfully and engaged in vandalism against Government property.

We find no merit to the reasons respondent offers for concluding he did not violate § 1382. First, nothing in the statute or its history supports the assertion that § 1382 applies only to reentry that occurs within some "reasonable" period of time. Respondent argues that most prosecutions for violating the second paragraph of § 1382 have involved reentry within a year after issuance of a bar order, and further asserts that recent bar letters for Hickam have been limited to a 1- or 2-year period. We agree that prosecution under § 1382 would be impermissible if based on an invalid bar order. But even assuming the accuracy of respondent's description of prosecutorial and military policy, we do not believe that it justifies engrafting onto § 1382 a judicially defined time limit. Although due process or military regulations might limit the effective lifetime of a bar order, § 1382 by its own terms does not limit the period for which a commanding officer may exclude a civilian from a military installation.

Section 1382, we further conclude, applies during an open house. Of course, Congress in 1909 very likely gave little thought to open houses on military bases. The pertinent question, however, is whether § 1382 applies to a base that is open to the general public. The language of the statute does not limit § 1382 to military bases where access is restricted. Moreover, the legislative intent to punish panderers and others who repeatedly enter military facilities suggests that Congress was concerned with bases that are to some extent open to nonmilitary personnel. Finally, limiting the prohibition on reentry to closed military bases would make the second paragraph of § 1382 almost superfluous, because the

first paragraph of the statute already makes it unlawful for a person to go upon a military installation "for any purpose prohibited by law or lawful regulation." 18 U. S. C. § 1382. Cf. *Heckler* v. *Chaney*, 470 U. S. 821, 829 (1985) (noting common-sense principle that a statute is to be read to give effect to each of its clauses).

The final statutory argument advanced by respondent is that he did not violate § 1382 because he did not subjectively believe that his attendance at the open house was contrary to a valid order barring reentry. This argument misperceives the knowledge required for a violation of the statute. Cf. *United States* v. *Parrilla Bonilla*, 648 F. 2d 1373, 1377 (CA1 1981) (specific intent to violate particular regulation not required for violation of first paragraph of § 1382). The second paragraph of § 1382 does not contain the word "knowingly" or otherwise refer to the defendant's state of mind, and there is no requirement that the Government prove improper motive or intent. *Holdridge* v. *United States*, 282 F. 2d 302, 310–311 (CA8 1960). Respondent does not dispute that he received the bar letter in 1972 and deliberately and knowingly reentered the base to which the letter applied. Nothing in the language of § 1382 or in previous judicial decisions supports the rather remarkable proposition that merely because respondent thought the bar order was no longer effective, he was thereby immunized from prosecution. Cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U. S. 558, 563 (1971).

We also reject the suggestion, made in the dissenting opinion, that § 1382 does not apply because the circumstances did not reasonably indicate to respondent that his reentry during the open house was prohibited. *Post*, at 696–697, 701. The assertion that respondent lacked notice that his entry was prohibited is implausible. The bar letter in no way indicated that it applied only when public access to Hickam was restricted. Any uncertainty respondent had in this regard might have been eliminated had he sought, in

accord with the bar letter, permission to reenter from the base commander. There is no contention that respondent ever asked to have the bar letter rescinded or otherwise requested permission to reenter the base. Moreover, the dissenting opinion exaggerates the implications of our holding. We have no occasion to decide in what circumstances, if any, § 1382 can be applied where anyone other than the base commander has validly ordered a person not to reenter a military base. Nor do we decide or suggest that the statute can apply where a person unknowingly or unwillingly reenters a military installation. Finally, we note that respondent has not disputed that he entered a portion of Hickam that was a "military reservation, army post, fort, or arsenal" within the meaning of § 1382.

III

The Court of Appeals held that the First Amendment bars respondent's conviction for violating § 1382. A military base, the court acknowledged, is ordinarily not a public forum for First Amendment purposes even if it is open to the public. See *Greer* v. *Spock*, 424 U. S. 828 (1976). Nonetheless, the court relied on *Flower* v. *United States*, 407 U. S. 197 (1972) *(per curiam)*, to conclude that portions of Hickam constituted at least a temporary public forum because the military had opened those areas to the public for purposes related to expression. 710 F. 2d, at 1414–1417. Having found that the public had a First Amendment right to hold signs and to distribute leaflets at Hickam on Armed Forces Day, the Court of Appeals then considered whether the military could rely on the bar letter to exclude respondent from the base. *Id.*, at 1417. The court, again relying on *Flower*, held that the military lacks power to exclude persons from a military base that has become a public forum. 710 F. 2d, at 1417.

In holding that § 1382 cannot be applied during an open house, the Court of Appeals misapprehended the significance of *Flower*. As this Court later observed in *Greer*, the decision in *Flower* must be viewed as an application of estab-

lished First Amendment doctrine concerning expressive activity that takes place in a municipality's open streets, sidewalks, and parks. 424 U. S., at 835–836. *Flower* did not adopt any novel First Amendment principles relating to military bases, but instead concluded that the area in question was appropriately considered a public street. There is "no generalized constitutional right to make political speeches or distribute leaflets," *id.*, at 838, on military bases, even if they are generally open to the public. *Id.*, at 830, 838, and n. 10. *Greer* clarified that the significance of the *per curiam* opinion in *Flower* is limited by the unusual facts underlying the earlier decision. 424 U. S., at 837.

The Court in *Flower* summarily reversed a conviction under § 1382 of a civilian who entered a military reservation after receiving a bar letter. At the time of his arrest, the civilian was "quietly distributing leaflets on New Braunfels Avenue at a point within the limits of Fort Sam Houston" in San Antonio, Texas. 407 U. S., at 197. No sentry was posted anywhere along the street, which was open to unrestricted civilian traffic 24 hours a day. *Id.*, at 198. The Court determined that New Braunfels Avenue was a public thoroughfare no different than other streets in the city, and that the military had abandoned not only the right to exclude civilian traffic from the avenue, but also any right to exclude leafleteers. *Greer* v. *Spock*, *supra*, at 835. The defendant in *Flower* received a bar letter because he participated in an attempt to distribute unauthorized publications on the open military base. 407 U. S., at 197; *United States* v. *Flower*, 452 F. 2d 80, 82, 87 (CA5 1971). This was the very activity that *Flower* held protected by the First Amendment.

Flower cannot plausibly be read to hold that regardless of the events leading to issuance of a bar letter, a person may not subsequently be excluded from a military facility that is temporarily open to the public. Instead, *Flower* establishes that where a portion of a military base constitutes a public forum because the military has abandoned any right to ex-

clude civilian traffic and any claim of special interest in regulating expression, see *Greer* v. *Spock*, *supra*, at 836–838, a person may not be excluded from that area on the basis of activity that is itself protected by the First Amendment. Properly construed, *Flower* is simply inapplicable to this case. There is no suggestion that respondent's acts of vandalism in 1972, which resulted in the issuance of the bar letter, were activities protected by the First Amendment. The observation made by the Court of Appeals, 710 F. 2d, at 1417, that enforcement of the bar letter was precipitated by respondent's "peaceful expressive activity" misses the point. Respondent was prosecuted not for demonstrating at the open house, but for reentering the base after he had been ordered not to do so.

Respondent argues that because Hickam was temporarily transformed into a public forum, the exercise of standardless discretion by the base commander to exclude him from the base violates the First Amendment. Cf. *Shuttlesworth* v. *Birmingham*, 394 U. S. 147, 150–151 (1969). The conclusion of the Court of Appeals that Hickam was ever a public forum is dubious. Military bases generally are not public fora, and *Greer* expressly rejected the suggestion that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." 424 U. S., at 836. See also *United States* v. *Grace*, 461 U. S., at 177. Nor did Hickam become a public forum merely because the base was used to communicate ideas or information during the open house. *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114, 130, n. 6 (1981). The District Court did not make express findings on the nature of public access to Hickam during the open house, and the record does not suggest that the military so completely abandoned control that the base became indistinguishable from a public street as in *Flower*.

Whether or not Hickam constituted a public forum on the day of the open house, the exclusion of respondent did not violate the First Amendment. Respondent concedes that the commander of Hickam could exclude him from the closed base, but contends this power was extinguished when the public was invited to enter on Armed Forces Day. We do not agree that "the historically unquestioned power of a commanding officer to exclude civilians from the area of his command," *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 893 (1961), should be analyzed in the same manner as government regulation of a traditional public forum simply because an open house was held at Hickam. See *Greer* v. *Spock*, 424 U. S., at 838, n. 10 (fact that speakers previously allowed on base "did not leave the authorities powerless thereafter to prevent any civilian from entering . . . to speak on any subject whatever"). The fact that respondent had previously received a valid bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base. That justification did not become less weighty when other persons were allowed to enter. Indeed, given the large number of people present during an open house, the need to preserve security by excluding those who have previously received bar letters could become even more important, because the military may be unable to monitor closely who comes and goes. Where a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public.

Section 1382 is content-neutral and serves a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security. Application of a facially neutral regulation that incidentally burdens speech satisfies the First Amendment if it "furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968). Respondent argues that even if *O'Brien* applies here, the general exclusion of recipients of bar letters from military open houses fails under the First Amendment because it is greater than is essential to the furtherance of Government interests in the security of military installations.

Respondent maintains that enforcing bar letters is not essential to security because reported cases concerning § 1382 have not involved vandalism or other misconduct during open houses. Moreover, respondent asserts that persons holding bar letters have been allowed to attend open houses on bases other than Hickam. Finally, respondent contends that the Government interests were adequately served by the security measures taken during the open house and by statutes that punish any misconduct occurring at such events. Cf. 710 F. 2d, at 1417 (noting that "sensitive areas of Hickam were cordoned off and protected by guards"). Respondent's arguments in this regard misapprehend the third element of the *O'Brien* standard. We acknowledge that barring respondent from Hickam was not "essential" in any absolute sense to security at the military base. The military presumably could have provided him with a military police chaperone during the open house. This observation, however, provides an answer to the wrong question by focusing on whether there were conceivable alternatives to enforcing the bar letter in this case.

The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. See *Clark* v. *Community for Creative Non-Violence*, 468 U. S. 288, 296–297 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"). Regulations that burden speech incidentally or control the

time, place, and manner of expression, see *id.*, at 298–299, and n. 8, must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Id.*, at 299. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Cf. 468 U. S., at 297 ("if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment"). The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests. *Id.*, at 299.

We are persuaded that exclusion of holders of bar letters during military open houses will promote an important Government interest in assuring the security of military installations. Nothing in the First Amendment requires military commanders to wait until persons subject to a valid bar order have entered a military base to see if they will conduct themselves properly during an open house. Cf. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 52, and n. 12 (1983). In *Community for Creative Non-Violence*, we observed that *O'Brien* does not "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." 468 U. S., at 299 (footnote omitted). We are even less disposed to conclude that *O'Brien* assigns to the judiciary the authority to manage military facilities throughout the Nation.

As a final First Amendment challenge to his conviction, respondent asserts that the Government apprehended and prosecuted him because it opposed the demonstration against

nuclear war. This argument lacks evidentiary support. The demonstration did attract the attention of military officials to respondent and his companions, and the base Commander ordered military police to stop them from displaying their banner and distributing leaflets. Nonetheless, Major Jones testified that respondent was not approached or apprehended until he was identified as the possible holder of a bar letter. App. 9–11, 13–14. The trial judge found that this testimony was accurate, Tr. 98, and we see no reason to disturb that finding on appeal. Inasmuch as respondent contends that his prosecution was impermissibly motivated, he did not raise below and the record does not support a claim that he was selectively prosecuted for engaging in activities protected by the First Amendment. Cf. *Wayte* v. *United States*, 470 U. S. 598, 608–610 (1985).

IV

Before the District Court and the Court of Appeals, respondent argued that his prosecution based on the 1972 bar letter violated due process. Respondent has made similar arguments to this Court. Brief for Respondent 19, 20, 26–27, n. 38. Although a commanding officer has broad discretion to exclude civilians from a military base, this power cannot be exercised in a manner that is patently arbitrary or discriminatory. *Cafeteria Workers* v. *McElroy*, 367 U. S., at 898. Respondent, however, has not shown that the 1972 bar letter is inconsistent with any statutory or regulatory limits on the power of military officials to exclude civilians from military bases. Nor do we think that it is inherently unreasonable for a commanding officer to issue a bar order of indefinite duration requiring a civilian to obtain written permission before reentering a military base. The Court of Appeals did not address whether, on the facts of this case, application of the 1972 bar letter to respondent was so patently arbitrary as to violate due process, and we therefore do not decide that issue.

For the reasons stated, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

In 1909 Congress enacted a new statute making it a federal crime to trespass on military bases in specified circumstances. That statute, now codified as 18 U. S. C. § 1382, provided:

> "Whoever shall go upon any military reservation, army post, fort, or arsenal, for any purpose prohibited by law or military regulation made in pursuance of law, or whoever shall reenter or be found within any such reservation, post, fort, or arsenal, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof, shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both." 35 Stat. 1097.

In my opinion, Congress did not intend to punish a visit to a military reservation under the second clause of this statute when circumstances reasonably indicated that the visit was not prohibited but welcome.

In this case, respondent was "removed as a trespasser from Hickam Air Force Base," on March 2, 1972, and "ordered not to reenter."[1] The removal and order not to

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[1] In addition to his removal from the base, respondent received a two-paragraph form letter. The first paragraph reads as follows:

"You are being removed as a trespasser from Hickam Air Force Base, a military reservation, and ordered not to reenter the confines of this installation without the written permission of the Commander or an officer designated by him to issue a permit of reentry." App. 43.

The second paragraph of the letter calls the addressee's attention to 18 U. S. C. § 1382, which is quoted in full.

return apparently were the result of respondent's destruction of Government property valued under $100 during a demonstration against the war in Vietnam.[2]

Over nine years later, respondent was "found within . . . such reservation." Among 50,000 other civilians, he had accepted a widely advertised invitation to the public to attend the 32nd Annual Armed Forces Day Open House hosted by Hickam Air Force Base on May 16, 1981. A news release, issued by the Base, stated:

> "HICKAM HOSTS JOINT SERVICE OPEN HOUSE
>
> "Hickam Air Force Base, Hawaii (April 16, 1981)—The 32nd Annual Armed Forces Day Open House will be held here Saturday May 16 from 9 a. m. to 4 p. m. The

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[2] During the bench trial, when the prosecution offered to prove respondent's 1972 offense, the following colloquy occurred:

"THE COURT: Well, it really doesn't make any difference what he was arrested for or what he was convicted of. He was issued a bar letter, right?

"MR. STARLING [for the United States]: Yes.

"THE COURT: He could have been issued a bar letter for chewing gum in the wrong place.

"MR. STARLING: Your Honor, I perceive that on the record it's not going to be clear as to who exactly got the bar letter.

"THE COURT: Go ahead.

"[MR. STARLING:] Okay. [W]hat was the outcome of the case involving—

"THE COURT: If you know.

"[MR. STARLING:] —The incident on March 2nd, 1972?

"[MR. SHISHIDO, FBI SPECIAL AGENT:] Following the incident on March 2nd, . . .

"[MR. STARLING:] Yes.

"[THE WITNESS:] Well, James Albertini along with two others were brought to trial in federal district court and convicted of—

"MR. TRECKER [for the defendant]: Your Honor, we would object on the grounds that this—the witness is obviously testifying from hearsay at this point.

"THE COURT: I'll take judicial notice of the fact that I tried the case and they were convicted of misdemeanors, weren't they?

"THE WITNESS: Yes.

"THE COURT: Yes. Value under a hundred dollars." App. 7.

theme this year is the 'U. S. Armed Forces—Strong and Ready.'

"Top local, country and western, and military entertainment—provided by the Royal Hawaiian Band, the Aloha Airlines Musical/Hula Troupe, J. T. and the Rowdy Band, Dave West and the Chaingang, Chris Cassidy and the Rainbow Connection, the Skylarks and the Fleet Marine Force Pacific Band—will perform during the open house.

"More than 30 aircraft from the U. S. Army, Navy, Air Force, Marine Corps, Coast Guard, Hawaii Army and Air National Guard, Civil Air Patrol and the Wheeler Aero Club will be on display throughout the day.

"Parachute jumps by the Navy and the Marine Corps, Marine troops, rappelling from helicopters, aircraft flyovers by the Hawaii Air National Guard, Air Force and the Navy are also scheduled.

"Additionally, a crash/rescue demonstration by the Hickam Fire Department, a helicopter rescue demonstration by the Coast Guard and several police dog demonstrations by the Hickam Security Police will be conducted that day.

"Also open that day is the annual Air Force Hawaii Youth Festival. Carnival rides, games and a midway packed with food and drinks will be the main attractions. Air Force nominees, representing the various commands at Hickam will compete for the crown of Youth Festival Queen. The crowning ceremony will take place Friday evening at 6 p. m.

"Hickam, normally a closed base, will be open to the public for the Armed Forces Day Open House." App. 46–47.

Radio advertisements extended a similar invitation to the public to attend the open house. *Id.*, at 48.

In my opinion, respondent's visit to the open house in this case in response to a general invitation to the public extended

nine years after he was removed from the base and ordered not to reenter does not involve the kind of reentry that Congress intended to prohibit when it enacted the 1909 statute. In reaching a contrary conclusion, the Court relies heavily on the ordinary meaning of the statutory language, the fact that respondent had committed a misdemeanor on the base in 1972, and the fact that respondent's removal in 1972 was evidenced by a "bar letter." The "plain language" argument proves too much, and the evidentiary arguments prove too little.

I

In *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961), this Court recognized "the historically unquestioned power of a commanding officer summarily to exclude civilians from the area of his command." *Id.*, at 893. In exercising this power, a base commander is only limited by the Constitution and by the standard administrative requirement that "he must not act in an arbitrary or capricious manner. His action must be reasonable in relation to his responsibility to protect and preserve order on the installation and to safeguard persons and property thereon."[3] Even with these limitations, civilians may be removed from military bases for a wide variety of reasons such as reconnoitering military fortifications or troop movements, carrying a concealed weapon or a controlled substance, destroying Government property, creating a disturbance, violating a traffic regulation, attempting to induce a soldier to visit a saloon or to engage in an immoral act, wandering into an area where a training exercise is in progress, or perhaps even "chewing gum in the wrong place." See n. 2, *supra*.[4]

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[3] U. S. Air Force Reg. No. 355–11, ¶ 1(b) (Sept. 10, 1971). See also U. S. Dept. of Defense Directive No. 5200.8, ¶ C (July 29, 1980); *Cafeteria Workers* v. *McElroy*, 367 U. S., at 898.

[4] The record in *Greer* v. *Spock*, 424 U. S. 828 (1976), indicated that bar orders "have been issued for offenses such as possession of marijuana or narcotics, assault, possession of stolen property, solicitation for prostitu-

Congress enacted § 1382 as a supplement to the military's power to exclude unwelcome civilians from military installations. The Senate and House Committee Reports on the bill explain the reasons for enacting § 1382:

> "It is . . . designed to punish persons who, having been ejected from a fort, reservation, etc., return for the purpose of obtaining information respecting the strength, etc., of the fort, etc., or for the purpose of inducing the men to visit saloons, dives, and similar places. Such persons may now go upon forts and reservations repeatedly for such purposes and there is no law to punish them." S. Rep. No. 10, 60th Cong., 1st Sess., 16 (1908); H. R. Rep. No. 2, 60th Cong., 1st Sess., 16 (1908).[5]

Section 1382 provides for criminal punishment, in addition to administrative ejectment, for a limited class of unwelcome visitors to military installations.

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tion, carrying concealed weapons, traffic offenses, contributing to the deliquency of a minor, impersonating a female, fraud, and unauthorized use of an ID card." *Spock* v. *David*, 469 F. 2d 1047, 1055 (CA3 1972).

[5] The purpose of the section was outlined in the House debates on the bill:

"Mr. WILLIAMS. . . . [T]he object of this law is to keep out spies, and to keep out people who want to draw maps of forts and arsenals and who want to find out the sort of powder we are compounding. The object is to protect the military secrets of the Government from those in whose possession they might do harm . . . .

. . . . . .

"Mr. MOON[.] The object of this section has been clearly expressed by [Mr. Williams]. It was urged . . . by the War Department, not only for the purposes enumerated there, but to protect soldiers from people coming onto the reservation and taking them off to dives and illicit places surrounding the encampments. It was said to be a frequent occurrence that people would come with carriages and conveyances and time after time lure the soldiers away. They could be ordered away, but there was no law to punish them for reentering and constantly returning, and therefore they constantly defied authority by reappearing upon the reservation." 42 Cong. Rec. 689 (1908).

See also *id.*, at 589.

The power to initiate criminal proceedings under § 1382 is narrower than the base commander's broad power to exclude civilians from his facility. By its terms, the first clause of the statute only applies to persons who seek entry to a military installation for the purpose of committing unlawful acts. The second applies to any person who reenters the facility after physical removal or an order not to reenter. The limited criminal liability provided by Congress in § 1382 evinces a design to protect innocent or inadvertent entries onto military lands from becoming a criminal trespass.[6]

The two clauses of § 1382 were originally enacted as a single sentence; if they are read together, a plausible construction becomes apparent. The statute was aimed at trespassers—civilians whom the military had the power to exclude but not to punish. The first clause authorized the punishment of a trespasser if it could be proved that he had entered "for any purpose prohibited by law or [lawful] military regulation"; the second clause made it unnecessary to prove any unlawful purpose if the trespasser "reenter[s]" after having been removed. In many circumstances, of course, a second trespass in defiance of removal or an order not to reenter may safely be presumed to be motivated by an unlawful purpose—especially when the reentry closely follows the exclusion from the base, and its circumstances are similar.

When circumstances reasonably indicate to an individual that a visit to the base is permitted or even welcome, there is no "reentry" in defiance of authority as the statute here

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[6] The comment following the Model Penal Code section defining criminal trespass suggests that this design is a familiar one: "The common thread running through [statutes defining criminal trespass] is the element of unwanted intrusion, usually coupled with some sort of notice to would-be intruders that they may not enter." American Law Institute, Model Penal Code § 221.2, Comment 1 (1980). The Code requires that a criminal trespasser know "that he is not licensed or privileged" to enter the property. §§ 221.2(1), (2). It also provides an affirmative defense to any intruder who "reasonably believed that the owner of the premises . . . would have licensed him to enter or remain." § 221.2(3)(c).

presumes. Base authorities, of course, have ample power to exclude such individuals. But criminal prosecution of a person entering under these circumstances is fundamentally inconsistent with Congress' intent to excuse innocent and inadvertent intrusions onto military reservations. No rule of construction requires that we attribute to Congress an intent which is at odds with its own design and which results "in patently absurd consequences." *United States* v. *Brown*, 333 U. S. 18, 27 (1948). In fact, this Court, "in keeping with the common-law tradition and with the general injunction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,' *Rewis* v. *United States*, 401 U. S. 808, 812 (1971), has on a number of occasions read a state-of-mind component into an offense even when the statutory definition did not in terms so provide." *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437 (1978).

II

Adopting a starkly literal interpretation of the second clause of § 1382, the Court concludes that Congress intended to impose strict liability every time an individual is "found within" a military reservation after having been "removed therefrom or ordered not to reenter." Under this construction, the circumstances of neither the removal nor the reentry are relevant to the criminal offense. Emphasizing the absence of any reference to the defendant's state of mind in the second clause, the Court rejects what it considers to be the "remarkable proposition" that a civilian removed from a base or ordered not to reenter may ever reasonably believe that he could safely return to the base. *Ante*, at 683. The Court's literal approach to the question of statutory construction, if applied with the frozen logic the Court purports to espouse, expands the coverage of the Act far beyond anything that Congress actually could have intended.

There are many situations in which the circumstances of the removal or order not to reenter simply do not suggest to

the reasonable citizen that a later reentry is barred. Under the Court's interpretation of the statute, a person who was removed from Hickam in 1972 because he was intoxicated, is guilty of a federal offense if he returns to attend an open house nine years later. Even worse, it is not inconceivable that at the 4 p. m. curfew hour many persons may not yet have departed the Hickam open house. If the base commander, or someone acting under his authority, terminated the party with an address over the loudspeaker system which ended with an unambiguous order to depart within the next 30 minutes, hundreds—perhaps thousands—of civilians would have "been removed therefrom" within the literal meaning of § 1382. If the statutory language is interpreted literally, every one of these civilians would act at his peril if he accepted an invitation to the open house in the following year.[7]

Moreover, highways or other public easements often bisect military reservations. Cf. *Flower* v. *United States*, 407 U. S. 197 (1972). Respondent has informed us that a substantial portion of the main runway at Honolulu International Airport lies inside the boundaries of Hickam Air Force Base. Brief for Respondent 8. If an individual who has been removed from Hickam is liable under § 1382 whenever he is thereafter "found within" its boundaries, he risks criminal punishment every time he departs on an airline flight that may use the runway traversing the base. The use of these military lands for the limited public purposes for which they

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[7] In response to this dissent, the Court has added a new paragraph disclaiming any suggestion that the statute would be applied literally "where anyone other than the base commander" issued the order not to reenter, or "where a person unknowingly or unwillingly reenters a military installation," *ante*, at 684. Having thus disclaimed the stark implications of its literal interpretation of the statute, the Court appears to rely instead on its own finding of fact that respondent must have known that his reentry was prohibited. I wonder if the Court would make the same finding if, instead of accepting an invitation to an open house, respondent had accepted an invitation to enlist in the Air Force.

have been set aside does not involve the bold defiance of authority that is foreseen by the structure of the statute and reflected in its legislative history. Surely Congress did not intend to impose criminal liability for the use of a civilian airport—even for persons who have been previously "removed" from a military base by administrative action, or ordered not to reenter.

The Court prefers to rely on the Due Process Clause to limit the oppressive and absurd consequences of its literal construction. It seems wiser to presume that "the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." *United States* v. *Kirby*, 7 Wall. 482, 486–487 (1869). At some point, common sense must temper the excesses of statutory literalism.

III

The Court repeatedly emphasizes that respondent received a "bar letter" ordering him not to reenter the base. The statute, however, contains no requirement that the removal of a trespasser be documented in any way or that an order not to reenter be in writing. In 1909 Congress was concerned with trespassers who refused to obey verbal orders to depart. See n. 5, *supra*. The practice of issuing written orders not to reenter apparently arose after the enactment of the statute in order to serve an evidentiary function.

The bar letter is evidence of the fact that its recipient has been removed from the base and ordered not to reenter. It is issued when prosecution for subsequent reentry is contemplated,[8] but nothing in the statute gives such a letter any

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[8] Paragraph 3(b) of U. S. Air Force Reg. 355–11 (Sept. 10, 1971) provides:

"Removal of Violators. If unauthorized entry occurs, the violators may be apprehended, ordered to leave, and escorted off the installation by personnel carefully selected for such duties. The complete and proper identification of visitors, including the taking of photographs, must be

greater legal effect than a sentry's ejectment of a peddler or a panderer. As a matter of administration, the practice of issuing such bar letters is surely commendable, but it cannot, in my judgment, expand the coverage of the statute in the slightest.

The Court also seems to attach significance to the fact that the bar letter delivered to respondent in 1972 had been precipitated by an unlawful act. I agree, of course, that Congress could not have intended the statute to apply to a reentry following an invalid order of removal—even if the literal wording of the Act draws no such distinction. But a verbal order to depart simply because the curfew hour has been reached has the same legal effect as an order to depart because a crime has been committed. In either event, a reentry will violate § 1382.

In this case, the evidentiary significance of the 1972 removal and order not to reenter is significantly attenuated by the passage of nearly a decade from the date of the event. Every area of our laws recognizes that at some point, "even wrongdoers are entitled to assume that their sins may be forgotten." *Wilson* v. *Garcia*, 471 U. S. 261, 271 (1985). By limiting the effect of orders not to reenter to a period of one or two years, App. 60–62, recent military practice has recognized that the character of an individual may change dramatically over time. Cf. Fed. Rule Evid. 609(b). Indeed, until this case no reported prosecution under § 1382 relied on a removal or order not to reenter of greater vintage.[9]

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accomplished. Violators who reenter an installation—after having been removed from it or having been ordered, by an officer or person in command or charge, not to reenter—may be prosecuted under 18 U. S. C. 1382. If prosecution for subsequent reentry is contemplated, the order not to reenter should be in writing (Attachment #1), so as to be easily susceptible of proof. Commanders are cautioned that only civil law enforcement authorities have the power to arrest and prosecute for unauthorized entry of Government property."

[9] *Flower* v. *United States*, 407 U. S. 197 (1972) (reentry 1½ months after order barring reentry); *United States* v. *Quilty*, 741 F. 2d 1031 (CA7 1984)

A decade-old bar letter might provide a basis for excluding the recipient from a base under appropriate circumstances. It does not, however, provide persuasive evidence that a reasonable person would believe that its proscriptive effect continued in perpetuity to pre-empt the effect of a public invitation to attend an open house at the base.[10] This is especially so when the original order was issued for a relatively minor transgression completely unrelated to the circumstances of the later intrusion.

The refrain in the Court's opinion concerning bar letters that the respondent may have received from other military bases in Hawaii is baffling considering its holding that the reasonableness of the later intrusion is irrelevant. The Court's reliance on these bar letters is especially puzzling since they are not contained in the record and may well have been invalid.[11] In any case, the fact that respondent's opposition to military preparedness may have caused other base commanders to deliver bar letters to him is quite irrelevant to the question whether circumstances reasonably indicated

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(1½ months); *United States* v. *May*, 622 F. 2d 1000 (CA9) (176 defendants, 1 day; 5 defendants, 10½ months), cert. denied *sub nom. Phipps* v. *United States*, 449 U. S. 984 (1980); *United States* v. *Douglass*, 579 F. 2d 545 (CA9 1978) (16 days after bar letter, 1 day after verbal order not to reenter); *Government of Canal Zone* v. *Brooks*, 427 F. 2d 346 (CA5 1970) (conviction affirmed 17 months after order issued); *United States* v. *Jelinski*, 411 F. 2d 476 (CA5 1969) (reentry 7½ months after order); *Weissman* v. *United States*, 387 F. 2d 271 (CA10 1967) (2 days); *Holdridge* v. *United States*, 282 F. 2d 302 (CA8 1960) (Blackmun, J., for the court) (same day).

[10] Cf. *United States* v. *Gourley*, 502 F. 2d 785, 788 (CA10 1973) (order not to reenter held invalid where issued for expressive activity at football game held in stadium on Air Force Academy grounds, in part, because "spectators are actively encouraged to attend the games, and do so in large numbers with no restrictions whatever at the gates").

[11] At oral argument, the Government conceded that a bar order would be invalid if it had been issued in response to activity protected by the First Amendment. Tr. of Oral Arg. 13–14, 21. The order involved in *Flower* v. *United States*, 407 U. S. 197 (1972), is an example of such an order. See also n. 10, *supra*.

to him that his attendance at the Hickam open house was prohibited. At most, these unrelated incidents might have supported the removal of respondent from Hickam if he sought to enter, or perhaps the issuance of a fresh order barring reentry there.[12]

The Court seems to regard "the effective lifetime of a bar order" as the critical issue. It concedes that the Constitution or military regulation may constrain a commanding officer's power to exclude a civilian from a military installation, and correctly observes that § 1382 does not place any limit on that power. *Ante*, at 682. What the Court overlooks is the distinction between the commander's power to exclude—which is very broad indeed—and the sovereign's power to punish which may not extend one inch beyond the authority conferred by Congress.[13]

In my opinion, Congress did not authorize the prosecution of a civilian who accepted a military base Commander's invitation to attend an open house on the base simply because the civilian had been "removed therefrom" and "ordered not to reenter" some nine years earlier.

I respectfully dissent.

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[12] No removal occurred until respondent was removed from the open house, and no new bar order was ever delivered to him. App. 28, 30.

[13] The relevant Air Force Regulation, n. 8, *supra*, however, does carefully distinguish between the power to exclude and the power to prosecute.

ESTATE OF THORNTON ET AL. *v.* CALDOR, INC.

CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

No. 83–1158. Argued November 7, 1984—Decided June 26, 1985

Petitioner's decedent, Donald E. Thornton, worked in a managerial position at a Connecticut store owned by respondent, which operated a chain of New England retail stores. In 1979, Thornton informed respondent that he would no longer work on Sundays, as was required by respondent as to managerial employees. Thornton invoked the Connecticut statute which provides: "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal." Thornton rejected respondent's offer either to transfer him to a management job in a Massachusetts store that was closed on Sundays, or to transfer him to a nonsupervisory position in the Connecticut store at a lower salary. Subsequently, respondent transferred Thornton to a clerical position in the Connecticut store; Thornton resigned two days later and filed a grievance with the State Board of Mediation and Arbitration, alleging that he was discharged from his manager's position in violation of the Connecticut statute. The Board sustained the grievance, ordering respondent to reinstate Thornton, and the Connecticut Superior Court affirmed the Board's ruling, concluding that the statute did not offend the Establishment Clause of the First Amendment. The Connecticut Supreme Court reversed.

Held: The Connecticut statute, by providing Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath, violates the Establishment Clause. To meet constitutional requirements under that Clause, a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion. *Lemon* v. *Kurtzman*, 403 U. S. 602. The Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of an employee by enforcing observance of the Sabbath that the latter unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. In granting unyielding weighting in favor of Sabbath observers over all other interests, the statute has a

primary effect that impermissibly advances a particular religious practice. Pp. 708–711.

191 Conn. 336, 464 A. 2d 785, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 711. REHNQUIST, J., dissented.

Nathan Lewin argued the cause for petitioner Estate of Thornton. With him on the briefs were *Dennis Rapps*, *Daniel D. Chazin*, and *Marc D. Stern*. *Joseph I. Lieberman*, Attorney General, argued the cause for petitioner-intervenor State of Connecticut urging reversal. With him on the briefs were *Elliot F. Gerson*, Deputy Attorney General, *Henry S. Cohn*, Assistant Attorney General, and *John Edward Sexton*.

Paul Gewirtz argued the cause for respondent. With him on the brief was *Eliot B. Gersten*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a state statute that provides employees with the absolute right not to work

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Bator*, *Michael W. McConnell*, *Brian K. Landsberg*, *Dennis J. Dimsey*, and *David L. Slate*; for the Anti-Defamation League of B'nai B'rith by *Meyer Eisenberg*, *Jeffrey P. Sinesky*, and *Leslie K. Shedlin*; for Americans United for Separation of Church and State by *Lee Boothby*; for the Council of State Governments et al. by *Lawrence R. Velvel* and *Elaine D. Kaplan*; for the National Right to Work Legal Defense Foundation by *Bruce N. Cameron*; and for the Seventh-Day Adventist Church by *Robert W. Nixon*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Michael H. Gottesman*, *Lawrence S. Gold*, and *George Kaufmann*; for the Connecticut Retail Merchants Association et al. by *Jay S. Seigel*; and for the Equal Employment Advisory Council by *Robert E. Williams* and *Douglas S. McDowell*.

on their chosen Sabbath violates the Establishment Clause of the First Amendment.

I

In early 1975, petitioner's decedent Donald E. Thornton[1] began working for respondent Caldor, Inc., a chain of New England retail stores; he managed the men's and boys' clothing department in respondent's Waterbury, Connecticut, store. At that time, respondent's Connecticut stores were closed on Sundays pursuant to state law. Conn. Gen. Stat. §§ 53–300 to 53–303 (1958).

In 1977, following the state legislature's revision of the Sunday-closing laws,[2] respondent opened its Connecticut stores for Sunday business. In order to handle the expanded store hours, respondent required its managerial employees to work every third or fourth Sunday. Thornton, a Presbyterian who observed Sunday as his Sabbath, initially

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[1] Thornton died on February 4, 1982, while his appeal was pending before the Supreme Court of Connecticut. The administrator of Thornton's estate has continued the suit on behalf of the decedent's estate.

[2] The state legislature revised the Sunday-closing laws in 1976 after a state court held that the existing laws were unconstitutionally vague. *State* v. *Anonymous*, 33 Conn. Supp. 55, 364 A. 2d 244 (Com. Pl. 1976). The legislature modified the laws to permit certain classes of businesses to remain open. Conn. Gen. Stat. § 53–302a (1985). At the same time, a new provision was added, § 53–303e, which prohibited employment of more than six days in any calendar week and guaranteed employees the right not to work on the Sabbath of their religious faith. See n. 3, *infra*. Soon after the revised Sunday-closing law was enacted, the Court of Common Pleas once again declared it unconstitutional. *State* v. *Anonymous*, 33 Conn. Supp. 141, 366 A. 2d 200 (1976). This decision was limited to the provision requiring Sunday closing, § 53–302a; the court did not consider the validity of other provisions such as § 53–303e. In 1978, the state legislature tried its hand at enacting yet another Sunday-closing law, Pub. Act No. 78–329, 1978 Conn. Pub. Acts 700–702; the Supreme Court of Connecticut declared the statute unconstitutional. *Caldor's Inc.* v. *Bedding Barn, Inc.*, 177 Conn. 304, 417 A. 2d 343 (1979). As had the Court of Common Pleas, the Connecticut Supreme Court did not address the constitutionality of § 53–303e and that provision remained in effect until challenged in this action.

complied with respondent's demand and worked a total of 31 Sundays in 1977 and 1978. In October 1978, Thornton was transferred to a management position in respondent's Torrington store; he continued to work on Sundays during the first part of 1979. In November 1979, however, Thornton informed respondent that he would no longer work on Sundays because he observed that day as his Sabbath; he invoked the protection of Conn. Gen. Stat. § 53–303e(b) (1985), which provides:

> "No person who states that a particular day of the week is observed as his Sabbath may be required by his employer to work on such day. An employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal."[3]

Thornton rejected respondent's offer either to transfer him to a management job in a Massachusetts store that was closed on Sundays, or to transfer him to a nonsupervisory position in the Torrington store at a lower salary.[4] In March 1980, respondent transferred Thornton to a clerical position in the Torrington store; Thornton resigned two days later

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[3] Thornton had learned of this statutory protection by consulting with an attorney. See App. 88a–90a.

Section 53–303e was enacted as part of the 1976 revision of the Sunday-closing laws. Apart from the 6-day week and the Sabbath-observance provisions, see n. 2, *supra*, the remainder of the statute provides:

"(c) Any employee, who believes that his discharge was in violation of subsection (a) or (b) of this section may appeal such discharge to the state board of mediation and arbitration. If said board finds that the employee was discharged in violation of said subsection (a) or (b), it may order whatever remedy will make the employee whole, including but not limited to reinstatement to his former or a comparable position.

"(d) No employer may, as a prerequisite to employment, inquire whether the applicant observes any Sabbath.

"(e) Any person who violates any provision of this section shall not be fined more than two hundred dollars."

[4] The collective-bargaining agreement in effect for nonsupervisory employees provided that they were not required to work on Sundays if it was "contrary [to the employee's] personal religious convictions." App. 91a.

and filed a grievance with the State Board of Mediation and Arbitration alleging that he was discharged from his manager's position in violation of Conn. Gen. Stat. § 53–303e(b) (1985).

Respondent defended its action on the ground that Thornton had not been "discharged" within the meaning of the statute; respondent also urged the Board to find that the statute violated Article 7 of the Connecticut Constitution as well as the Establishment Clause of the First Amendment.

After holding an evidentiary hearing the Board evaluated the sincerity of Thornton's claim and concluded it was based on a sincere religious conviction; it issued a formal decision sustaining Thornton's grievance. The Board framed the statutory issue as follows: "If a discharge for refusal to work Sunday hours occurred and Sunday was the Grievant's Sabbath . . . ," § 53–303e(b) would be violated; the Board held that respondent had violated the statute by "discharg-[ing] Mr. Thornton as a management employee for refusing to work . . . [on] Thornton's . . . Sabbath." App. 11a, 12a. The Board ordered respondent to reinstate Thornton with backpay and compensation for lost fringe benefits.[5] The Superior Court, in affirming that ruling, concluded that the statute did not offend the Establishment Clause.

The Supreme Court of Connecticut reversed, holding the statute did not have a "clear secular purpose." *Caldor, Inc.* v. *Thornton*, 191 Conn. 336, 349, 464 A. 2d 785, 793 (1983).[6] By authorizing each employee to designate his own Sabbath as a day off, the statute evinced the "unmistakable purpose . . . [of] allow[ing] those persons who wish to worship on a particular day the freedom to do so." *Ibid.* The court then held that the "primary effect" of the statute was to advance

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[5] The Board refused to consider respondent's constitutional challenge on the ground that, as a quasi-judicial body, it had no authority to pass on the constitutionality of state law. *Id.*, at 9a–10a.

[6] The court expressly chose not to consider whether the statute violated Article 7 of the Connecticut Constitution. 191 Conn., at 346, n. 7, 464 A. 2d, at 792, n. 7.

religion because the statute "confers its 'benefit' on an explicitly religious basis. Only those employees who designate a Sabbath are entitled not to work on that particular day, and may not be penalized for so doing." *Id.*, at 350, 464 A. 2d, at 794. The court noted that the statute required the State Mediation Board to decide which religious activities may be characterized as an "observance of Sabbath" in order to assess employees' sincerity, and concluded that this type of inquiry is "exactly the type of 'comprehensive, discriminating and continuing state surveillance' . . . which creates excessive governmental entanglements between church and state." *Id.*, at 351, 464 A. 2d, at 794 (quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 619 (1971)).

We granted certiorari, 465 U. S. 1078 (1984).[7] We affirm.

II

Under the Religion Clauses, government must guard against activity that impinges on religious freedom, and must take pains not to compel people to act in the name of any religion. In setting the appropriate boundaries in Establishment Clause cases, the Court has frequently relied on our holding in *Lemon*, *supra*, for guidance, and we do so here. To pass constitutional muster under *Lemon* a statute must not only have a secular purpose and not foster excessive entanglement of government with religion, its primary effect must not advance or inhibit religion.

The Connecticut statute challenged here guarantees every employee, who "states that a particular day of the week is observed as his Sabbath," the right not to work on his chosen day. Conn. Gen. Stat. § 53–303e(b) (1985). The State has thus decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day, no matter what burden or

[7] We also granted the State of Connecticut's motion to intervene as of right to defend the constitutionality of the state law. 465 U. S. 1098 (1984).

inconvenience this imposes on the employer or fellow workers. The statute arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath.[8]

In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.

There is no exception under the statute for special circumstances, such as the Friday Sabbath observer employed in an occupation with a Monday through Friday schedule—a school teacher, for example; the statute provides for no special consideration if a high percentage of an employer's work force asserts rights to the same Sabbath. Moreover, there is no exception when honoring the dictates of Sabbath observers

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[8] The State Board of Mediation and Arbitration construed the statute as providing Thornton with the absolute right not to work on his Sabbath. *Caldor, Inc.* v. *Thornton*, Conn. Bd. Med. & Arb. No. 7980–A–727 (Oct. 20, 1980), App. 11a–12a; accord, *G. Fox & Co.* v. *Rinaldi*, Conn. Bd. Med. & Arb. No. 8182–A–440 (Nov. 17, 1982) ("There is no question that . . . the employee has an absolute right to designate any day of the week as his or her sabbath [and that § 53–303e(b) would be violated if] the termination was as a result of the employee's refusal to work on her sabbath"). Following settled state law, see, *e. g.*, *Bruno* v. *Department of Consumer Protection*, 190 Conn. 14, 18, 458 A. 2d 685, 688 (1983) *(per curiam)*, the State Superior Court and the Supreme Court of Connecticut adopted the Board's construction of the statute, 191 Conn., at 340–343, 350, 464 A. 2d, at 789–790, 794. This construction of the state law is, of course, binding on federal courts. *E. g.*, *Brown* v. *Ohio*, 432 U. S. 161, 167 (1977); *Garner* v. *Louisiana*, 368 U. S. 157, 169 (1961); *Murdock* v. *City of Memphis*, 20 Wall. 590 (1875).

would cause the employer substantial economic burdens or when the employer's compliance would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers.[9] Finally, the statute allows for no consideration as to whether the employer has made reasonable accommodation proposals.

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand:

> "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Otten* v. *Baltimore & Ohio R. Co.*, 205 F. 2d 58, 61 (CA2 1953).

As such, the statute goes beyond having an incidental or remote effect of advancing religion. See, *e. g.*, *Roemer* v. *Maryland Bd. of Public Works*, 426 U. S. 736, 747 (1976); *Board of Education* v. *Allen*, 392 U. S. 236 (1968). The statute has a primary effect that impermissibly advances a particular religious practice.

III

We hold that the Connecticut statute, which provides Sabbath observers with an absolute and unqualified right not to

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[9] Section 53–303e(b) gives Sabbath observers the valuable right to designate a particular weekly day off—typically a weekend day, widely prized as a day off. Other employees who have strong and legitimate, but nonreligious, reasons for wanting a weekend day off have no rights under the statute. For example, those employees who have earned the privilege through seniority to have weekend days off may be forced to surrender this privilege to the Sabbath observer; years of service and payment of "dues" at the workplace simply cannot compete with the Sabbath observer's absolute right under the statute. Similarly, those employees who would like a weekend day off, because that is the only day their spouses are also not working, must take a back seat to the Sabbath observer.

work on their Sabbath, violates the Establishment Clause of the First Amendment. Accordingly, the judgment of the Supreme Court of Connecticut is

Affirmed.

JUSTICE REHNQUIST dissents.

JUSTICE O'CONNOR, with whom JUSTICE MARSHALL joins, concurring.

The Court applies the test enunciated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), and concludes that Conn. Gen. Stat. § 53–303e(b) (1985) has a primary effect that impermissibly advances religion. I agree, and I join the Court's opinion and judgment. In my view, the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.

All employees, regardless of their religious orientation, would value the benefit which the statute bestows on Sabbath observers—the right to select the day of the week in which to refrain from labor. Yet Connecticut requires private employers to confer this valued and desirable benefit only on those employees who adhere to a particular religious belief. The statute singles out Sabbath observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees. There can be little doubt that an objective observer or the public at large would perceive this statutory scheme precisely as the Court does today. *Ante*, at 708–710. The message conveyed is one of endorsement of a particular religious belief, to the detriment of those who do not share it. As such, the Connecticut statute has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny.

I do not read the Court's opinion as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act of 1964 are similarly invalid. These provisions preclude employment discrimination based on a person's reli-

gion and require private employers to reasonably accommodate the religious practices of employees unless to do so would cause undue hardship to the employer's business. 42 U. S. C. §§2000e(j) and 2000e–2(a)(1). Like the Connecticut Sabbath law, Title VII attempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause. See *Wallace* v. *Jaffree*, *ante*, at 83–84 (opinion concurring in judgment). The provisions of Title VII must therefore manifest a valid secular purpose and effect to be valid under the Establishment Clause. In my view, a statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. See *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 90, n. 4 (1977) (MARSHALL, J., dissenting). Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

Syllabus

UNITED STATES *v.* NATIONAL BANK OF COMMERCE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84–498. Argued April 15, 1985—Decided June 26, 1985

Section 6331(a) of the Internal Revenue Code of 1954 provides that the Government may collect taxes of a delinquent taxpayer "by levy upon all property and rights to property . . . belonging to such person." Section 6332(a) then provides that "any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary [of the Treasury or his delegate], surrender such property or rights . . . to the Secretary, except such part of the property or rights as is . . . subject to an attachment or execution." The Internal Revenue Service (IRS) levied on two joint accounts in respondent bank in Arkansas for delinquent income taxes owed by only one of the persons in whose names the accounts stood. When respondent, contending that it did not know how much of the money on deposit belonged to the delinquent taxpayer as opposed to his codepositors, refused to comply with the levy, the United States brought an action in Federal District Court, seeking judgment against respondent for the amount of the delinquent taxes. The District Court granted respondent's motion to dismiss. The Court of Appeals affirmed, holding that because under Arkansas garnishment law a creditor of a bank depositor is not subrogated to the depositor's power to withdraw the account, the IRS, too, could not stand in the depositor's shoes, and that the Government could not make use of the administrative procedure without negating or quantifying the claims that the delinquent taxpayer's codepositors might have to the funds in question. The court reasoned that the delinquent taxpayer did not possess a sufficient property interest in the funds to support the levy, that the codepositors might possess competing claims to the funds, and that an IRS levy is not normally intended for use against property in which third parties have an interest or which bears on its face the names of third parties.

Held: The IRS had a right to levy on the joint accounts in question. Pp. 719–733.

(a) A bank served with an IRS notice of levy has only two defenses for failure to comply with the demand: that it is neither "in possession of" nor "obligated with respect to" property or rights to property belonging to the delinquent taxpayer, or that the taxpayer's property is "subject

to a prior judicial attachment or execution." Here, the latter defense was not available, and so respondent's only defense was that the joint accounts did not constitute "property or rights to property" of the delinquent taxpayer. Pp. 721–722.

(b) In applying the Internal Revenue Code, state law controls in determining the nature of the legal interest which the taxpayer has in property. In this case, the delinquent taxpayer had an absolute right under state law to withdraw from the joint accounts, and such state-law right constitutes "property [or] rights to property" belonging to him within the meaning of § 6331(a). Respondent, in its turn, was "obligated with respect to" the taxpayer's right to that property under § 6332(a), since state law required it to honor any withdrawal request he might make. Respondent thus had no basis for refusing to honor the levy. In a levy proceeding, the IRS acquires whatever right the taxpayer himself possesses. Pp. 722–726.

(c) The question whether a state-law right constitutes "property" or "right to property" for federal tax-collection purposes is a matter of federal law. Thus, the facts that under Arkansas law the delinquent taxpayer's creditors could not exercise his right to withdrawal in their favor, and in a garnishment proceeding would have to join his codepositors, are irrelevant. That other parties may have competing claims to the account is not a legitimate statutory defense to the levy. A § 6331(a) administrative levy is only a *provisional* remedy, which does not determine the rights of third parties until *after* the levy is made, in post-seizure administrative or judicial hearings. Pp. 726–733.

726 F. 2d 1292, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 733.

Albert G. Lauber, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Archer*, *William S. Estabrook*, and *John A. Dudeck, Jr.*

Terry F. Wynne argued the cause and filed a brief for respondent.

JUSTICE BLACKMUN delivered the opinion of the Court.

Section 6331(a) of the Internal Revenue Code of 1954, as amended, 26 U. S. C. § 6331(a), provides that the Government may collect taxes of a delinquent taxpayer "by levy

upon all property and rights to property . . . belonging to such person."[1] Section 6332(a) of the Code, 26 U. S. C. § 6332(a), then provides that "any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights . . . to the Secretary."[2]

The controversy in this case concerns two joint accounts in a bank in Arkansas.[3] The issue is whether the Internal Revenue Service (IRS) has a right to levy on those accounts for delinquent federal income taxes owed by only one of the persons in whose names the joint accounts stand in order that the IRS may obtain provisional control over the amount in question.

I

A

The relevant facts are stipulated. On December 10, 1979, the IRS assessed against Roy J. Reeves federal income taxes, penalties, and interest for the taxable year 1977 in

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[1] Section 6331(a) reads in pertinent part:

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person. . . ."

Section 7701(a)(11)(B) of the Code reads:

"The term 'Secretary' means the Secretary of the Treasury or his delegate."

[2] Section 6332(a) reads:

"Except as otherwise provided in subsection (b), any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process."

[3] "The basic legal conception of a 'joint account' means that it be in two or more names." *Harbour* v. *Harbour*, 207 Ark. 551, 555, 181 S. W. 2d 805, 807 (1944).

the total amount of $3,607.45. As a result of payments and credits, the amount owing on the assessment was reduced to $856.61. App. 11.

On June 13, 1980, there were on deposit with respondent National Bank of Commerce, at Pine Bluff, Ark., the sum of $321.66 in a checking account and the sum of $1,241.60 in a savings account, each in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." *Id.*, at 11–12.[4] Each of the persons named, Roy Reeves, Ruby Reeves, and Neva R. Reeves, was authorized by contract with the bank to make withdrawals from each of these joint accounts. *Id.*, at 12.

On the same date, that is, on June 13, 1980, a notice of levy was served on the respondent bank pursuant to § 6331(d) of the Code, 26 U. S. C. § 6331(d), demanding that the bank pay over to the United States all sums the bank owed to Roy J. Reeves up to a total of $1,302.56. Subsequently, there was a Partial Release of Levy for the amount in excess of $856.61. On October 10, a final demand for payment was served on the bank.

The bank, contending that it did not know how much of the money on deposit belonged to Roy as opposed to Ruby and Neva, refused to comply with the levy. *Ibid.* The United States thereupon instituted this action in the United States District Court for the Eastern District of Arkansas, pursuant to § 6332(c)(1) of the Code, 26 U. S. C. § 6332(c)(1), seeking judgment against the bank in the amount of $856.61.[5]

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[4] No point is made as to any distinction between the "Roy J. Reeves" against whom the assessment was made, and the "Roy Reeves" whose name was on the two accounts. We assume, accordingly, that Roy J. Reeves and Roy Reeves are one and the same person.

The record does not disclose any relationship that may exist among the three codepositors. The parties have indicated that Neva is Roy's wife and that Ruby is his mother.

[5] The complaint also asserted liability, under § 6332(c)(2), for a 50% penalty. See App. 7. The Government, however, subsequently waived the penalty claim, and the complaint was amended accordingly. *Id.*, at 13–15.

By way of a supplement to the stipulation of facts, it was agreed that "[n]o further evidence as to the ownership of the monies in the subject bank accounts will be submitted." *Id.*, at 17. As a consequence, we do not know which of the three codepositors, as a matter of state law, owned the funds in the two accounts, or in what proportion. The facts thus come to us in very bare form. We are not confronted with any dispute as to who owns what share of the accounts. We deal simply with two joint accounts in the names of three persons, with each of the three entitled to draw out all the money in each of the accounts.

B

The case was submitted to the District Court on cross-motions for summary judgment and on the respondent bank's motion to dismiss the complaint. *Id.*, at 18–24. The District Court granted the motion to dismiss, holding the case procedurally "premature." 554 F. Supp. 110, 117 (1982). The court concluded that due process mandates "something more than the post-seizure lawsuit allowed" by the Code's levy procedures. *Id.*, at 114. In its view, "the minimum due process required in distraint actions against joint bank accounts," *ibid.*, compelled the IRS to identify the codepositors of the delinquent taxpayer and to provide them with notice and an opportunity to be heard. *Id.*, at 114–115. The court then outlined the procedures it believed the Constitution requires the IRS to follow when levying on a joint account. Specifically, it ruled that a bank, upon receiving a notice of levy, should freeze the assets in the account and provide the IRS with the names of the codepositors. *Id.*, at 114. The IRS then should notify the codepositors and give them a reasonable time "in which to respond both to the government and to the bank by affidavit or other appropriate means, specifically setting out any ownership interest in the joint account which they claim and the factual and legal basis for that claim." *Id.*, at 115. If the bank, on the basis of

such information, "believes that a genuine dispute exists as to the legality of any ownership claim made by" the codepositors, "it may refuse to surrender any portion of the funds so claimed." *Id.*, at 116. At that point, "the government may bring suit to enforce the levy on the contested funds," *ibid.*, but it must name the codepositors as defendants along with the bank.

The United States Court of Appeals for the Eighth Circuit affirmed. 726 F. 2d 1292 (1984). It expressed no opinion on the District Court's constitutional analysis. *Id.*, at 1293, 1300. It reached essentially the same result, however, as a matter of statutory construction. It ruled that the IRS, when levying on a joint bank account, has the burden of proving "the actual value of the delinquent taxpayer's interest in jointly owned property." *Id.*, at 1293. It observed that here "the rights of the various parties," *id.*, at 1300, had not been determined. Therefore, the Government had not shown the bank to be in possession of property or rights to property belonging to the delinquent taxpayer, Roy J. Reeves, as § 6331(a) required.

The Court of Appeals acknowledged that "Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income taxes. . . ." *Id.*, at 1295. It rejected, however, the Government's contention that it stood "in Roy's shoes and could do anything Roy could do, subject to whatever duties Roy owes to Ruby or Neva," *id.*, at 1295–1296, for it observed that "at least as to ordinary creditors, [that] is not the law of Arkansas." *Id.*, at 1296. Under state garnishment law, the court noted, a creditor of a codepositor is not "subrogated to that co-owner's power to withdraw the entire account." Instead, a creditor must join both co-owners as defendants and permit them to "show by parol or otherwise the extent of his or her interest in the account." *Ibid.*

The Court of Appeals then concluded that a similar precept should apply in administrative levy proceedings under the

Internal Revenue Code. It accordingly ruled that the Government could not prevail without negating or quantifying the claims that Ruby or Neva might have to the funds in question. It expressed the belief that an IRS administrative levy "is not normally intended for use as against property in which third parties have an interest" or as "against property bearing on its face the names of third parties." *Id.*, at 1300. In such a situation, the Government was free to "brin[g] suit to foreclose its lien under Section 7403," joining the codepositors as defendants. *Ibid.*

Because the opinion of the Court of Appeals appeared to us to conflict, directly or in principle, with decisions of other Courts of Appeals,[6] we granted certiorari. 469 U. S. 1105 (1985).

II

A

Section 6321 of the Code, 26 U. S. C. § 6321, provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Under the succeeding § 6322, the lien generally arises when an assessment is made, and it continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time."

The statutory language "all property and rights to property," appearing in § 6321 (and, as well, in §§ 6331(a) and, essentially, in 6332(a), see nn. 1 and 2, *supra*), is broad

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[6] See, *e. g.*, *United States* v. *Sterling National Bank & Trust Co. of New York*, 494 F. 2d 919, 922 (CA2 1974); *United States* v. *Citizens & Southern National Bank*, 538 F. 2d 1101, 1105–1107 (CA5 1976), cert. denied, 430 U. S. 945 (1977); *Babb* v. *Schmidt*, 496 F. 2d 957, 958–960 (CA9 1974); *Bank of Nevada* v. *United States*, 251 F. 2d 820, 824–826 (CA9 1957), cert. denied, 356 U. S. 938 (1958). See also Rev. Rul. 79–38, 1979–1 Cum. Bull. 406, 407.

and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have. See 4 B. Bittker, Federal Taxation of Income, Estates and Gifts ¶111.5.4, p. 111–100 (1981) (Bittker). "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U. S. 265, 267 (1945).

A federal tax lien, however, is not self-executing. Affirmative action by the IRS is required to enforce collection of the unpaid taxes. The Internal Revenue Code provides two principal tools for that purpose. The first is the lien-foreclosure suit. Section 7403(a) authorizes the institution of a civil action in federal district court to enforce a lien "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax." Section 7403(b) provides: "All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto." The suit is a plenary action in which the court "shall . . . adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property." §7403(c). See generally *United States* v. *Rodgers*, 461 U. S. 677, 680–682 (1983). The second tool is the collection of the unpaid tax by administrative levy. The levy is a provisional remedy and typically "does not require any judicial intervention." *Id.*, at 682. The governing statute is §6331(a). See n. 1, *supra*. It authorizes collection of the tax by levy which, by §6331(b), "includes the power of distraint and seizure by any means."

In the situation where a taxpayer's property is held by another, a notice of levy upon the custodian is customarily served pursuant to §6332(a). This notice gives the IRS the right to all property levied upon, *United States* v. *Eiland*, 223 F. 2d 118, 121 (CA4 1955), and creates a custodial relationship between the person holding the property and the IRS so that the property comes into the constructive possession of the Government. *Phelps* v. *United States*, 421 U. S.

330, 334 (1975). If the custodian honors the levy, he is "discharged from any obligation or liability to the delinquent taxpayer with respect to such property or rights to property arising from such surrender or payment." § 6332(d). If, on the other hand, the custodian refuses to honor a levy, he incurs liability to the Government for his refusal. § 6332(c)(1).

The administrative levy has been aptly described as a "provisional remedy." 4 Bittker, ¶ 111.5.5, at 111–108. In contrast to the lien-foreclosure suit, the levy does not determine whether the Government's rights to the seized property are superior to those of other claimants; it, however, does protect the Government against diversion or loss while such claims are being resolved. "The underlying principle" justifying the administrative levy is "the need of the government promptly to secure its revenues." *Phillips* v. *Commissioner*, 283 U. S. 589, 596 (1931). "Indeed, one may readily acknowledge that the existence of the levy power is an essential part of our self-assessment tax system," for it "enhances voluntary compliance in the collection of taxes." *G. M. Leasing Corp.* v. *United States*, 429 U. S. 338, 350 (1977). "Among the advantages of administrative levy is that it is quick and relatively inexpensive." *United States* v. *Rodgers*, 461 U. S., at 699.

The constitutionality of the levy procedure, of course, "has long been settled." *Phillips* v. *Commissioner*, 283 U. S., at 595. See *G. M. Leasing Corp.* v. *United States*, 429 U. S., at 352, n. 18.

B

It is well established that a bank account is a species of property "subject to levy," within the meaning of §§ 6331 and 6332. A levy on a bank account has been permitted since the Revenue Act of 1924, § 1016, 43 Stat. 343, and the Treasury Regulations explicitly authorize such levies. Treas. Reg. § 301.6331–1(a)(1), 26 CFR § 301.6331–1(a)(1) (1984).

The courts uniformly have held that a bank served with an IRS notice of levy "has only two defenses for a failure to com-

ply with the demand." *United States* v. *Sterling National Bank & Trust Co. of New York*, 494 F. 2d 919, 921 (CA2 1974), and cases cited. One defense is that the bank, in the words of § 6332(a), is neither "in possession of" nor "obligated with respect to" property or rights to property belonging to the delinquent taxpayer. The other defense, again with reference to § 6332(a), is that the taxpayer's property is "subject to a prior judicial attachment or execution." 494 F. 2d, at 921. Accord, *Bank of Nevada* v. *United States*, 251 F. 2d 820, 824 (CA9 1957), cert. denied, 356 U. S. 938 (1958).

There is no suggestion here that the Reeves accounts were subject to a prior judicial attachment or execution. Nor is there any doubt that the bank was "obligated with respect to" the accounts because, as it concedes, "Roy Reeves did have a right under Arkansas law to make withdrawals from the bank accounts in question." Brief for Respondent 2. The bank's only defense, therefore, is that the joint accounts did not constitute "property or rights to property" of Roy J. Reeves. See § 6331(a).

C

"'[I]n the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property.'" *Aquilino* v. *United States*, 363 U. S. 509, 513 (1960), quoting *Morgan* v. *Commissioner*, 309 U. S. 78, 82 (1940). See also *Sterling National Bank*, 494 F. 2d, at 921. This follows from the fact that the federal statute "creates no property rights but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U. S. 51, 55 (1958). And those consequences are "a matter left to federal law." *United States* v. *Rodgers*, 461 U. S., at 683. "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of [the statute], state law is inoperative," and the tax consequences thenceforth are dictated by federal law. *United States* v. *Bess*, 357 U. S., at 56–57. See also *Fidelity &*

Deposit Co. of Maryland v. *New York City Housing Authority*, 241 F. 2d 142, 144 (CA2 1957); Note, Property Subject to the Federal Tax Lien, 77 Harv. L. Rev. 1485, 1486–1487 (1964).

In the *Bess* case, the Court held that a delinquent taxpayer, who had purchased life insurance policies, did not have "property or rights to property" in the death proceeds of the policies, but that he did have such rights in their cash surrender value. 357 U. S., at 55–56. The latter conclusion, it was said, followed from the fact that the taxpayer insured had "the right under the policy contract to compel the insurer to pay him this sum." *Id.*, at 56. Thus, the insured's interest in the cash surrender value was subject to the federal tax lien. The fact that "under State law the insured's property right represented by the cash surrender value is not subject to creditors' liens" was irrelevant. *Id.*, at 56–57. State law defined the nature of the taxpayer's interest in the property, but the state-law consequences of that definition are of no concern to the operation of the federal tax law.

As noted above, it is stipulated that Roy J. Reeves had the unqualified right to withdraw the full amounts on deposit in the joint accounts without notice to his codepositors. In any event, wholly apart from the stipulation, Roy's right of withdrawal is secured by his contract with the bank, as well as by the relevant Arkansas statutory provisions. See Ark. Stat. Ann. §§ 67–521 and 67–552 (1980).[7] On its part, the bank was obligated to honor any withdrawal requests Roy might make, even up to the full amounts of the accounts. The Court of Appeals thus correctly concluded that, under Arkansas law, "Roy could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income

[7] Effective March 25, 1983, after the issuance of the notice of levy here, § 67–552 was amended and § 67–521 was repealed. 1983 Ark. Gen. Acts, No. 843, §§ 1 and 2. The result was recodification without substantial change.

taxes, and his co-owners would have had no lawful complaint against the bank." 726 F. 2d, at 1295.

Roy, then, had the absolute right under state law and under his contract with the bank to compel the payment of the outstanding balances in the two accounts. This, it seems to us, should have been an end to the case, for we agree with the Government that such a state-law right constituted "property [or] rights to property . . . belonging to" Roy, within the meaning of § 6331(a). The bank, in its turn, was "obligated with respect to" Roy's right to that property, § 6332(a), since state law required it to honor any withdrawal request he might make. The bank had no basis for refusing to honor the levy.[8]

The overwhelming majority of courts that have considered the issue have held that a delinquent taxpayer's unrestricted right to withdraw constitutes "property" or "rights to property" subject to provisional IRS levy, regardless of the facts

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[8] The dissent misunderstands the import of *United States* v. *Bess*, 357 U. S. 51, 55 (1958). See *post*, at 741–748. Because state law gives the delinquent the right to withdraw, but puts certain limits on the rights of creditors, and attaches certain consequences to that right as regards the delinquent himself, the dissent asserts that the Government is limited by these same state-law constraints. Thus it urges that the Government's right here is no greater than the rights given under state law, the right to withdraw and nothing else. It therefore erroneously characterizes the Government's authority here as limited to the right to levy on the right to withdraw, and nothing else. See *post*, at 741–745, and nn. 9 and 10. But under *Bess*, state law controls only in determining the nature of the legal interest which the taxpayer has in the property. See also *Aquilino* v. *United States*, 363 U. S. 509, 513 (1960). Once it is determined that under state law the delinquent has the right to withdraw property in a joint bank account, it is a matter of *federal* law what consequences attach to this right. And we agree with the Government that as a matter of federal law, the state-law right to withdraw money from a joint bank account is a "right to property" adequate to justify the use of the provisional levy procedure of § 6331. The dissent's references to state cases concerning the state-law implications of the right to withdraw, see *post*, at 741, thus are entirely irrelevant, for such state law is "inoperative" in determining the federal tax consequences of the delinquent's right to withdraw. See *Bess*, 357 U. S., at 56–57.

that other claims to the funds may exist and that the question of ultimate ownership may be unresolved at the time. See, *e. g.*, *United States* v. *Sterling National Bank & Trust Co. of New York*, 494 F. 2d, at 921–922; *United States* v. *Citizens & Southern National Bank*, 538 F. 2d 1101, 1105–1107 (CA5 1976), cert. denied, 430 U. S. 945 (1977); *Citizens & Peoples National Bank of Pensacola, Fla.* v. *United States*, 570 F. 2d 1279, 1282–1284 (CA5 1978); *Babb* v. *Schmidt*, 496 F. 2d 957, 958–960 (CA9 1974); *Bank of Nevada* v. *United States*, 251 F. 2d, at 824–826; *United States* v. *First National Bank of Arizona*, 348 F. Supp. 388, 389 (Ariz. 1970), aff'd, 458 F. 2d 513 (CA9 1972); *United States* v. *Equitable Trust Co.*, 49 AFTR2d ¶82–428 (Md. 1982); *Sebel* v. *Lytton Savings & Loan Assn.*, 65–1 USTC ¶9343 (SD Cal. 1965); *Tyson* v. *United States*, 63–1 USTC ¶9300 (Mass. 1962); *United States* v. *Third Nat. Bank & Trust Co.*, 111 F. Supp. 152, 155–156 (MD Pa. 1953). And the Eighth Circuit itself has observed that the "unqualified contractual right to receive property is itself a property right subject to seizure by levy." *St. Louis Union Trust Co.* v. *United States*, 617 F. 2d 1293, 1302 (1980).[9]

Common sense dictates that a right to withdraw qualifies as a right to property for purposes of §§ 6331 and 6332. In a levy proceeding, the IRS "'steps into the taxpayer's shoes,'" *United States* v. *Rodgers*, 461 U. S., at 691, n. 16, quoting 4 Bittker, ¶111.5.4, at 111–102; M. Saltzman, IRS Practice and Procedure ¶14.08, p. 14–32 (1981); Brief for Respondent 8. The IRS acquires whatever rights the taxpayer himself possesses. And in such circumstances, where, under

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[9] The dissent's suggestion that these cases are "irrelevant," see *post*, at 744, n. 9, stems from its erroneous assumption that state law dictates the extent of the Government's power to levy. It does not, and these cases all stand for the proposition that a delinquent's state-law right to withdraw funds from the joint bank account is a property interest sufficient for purposes of federal law for the Government to levy the account, notwithstanding the fact that questions as to the ultimate ownership of the funds may be unresolved.

state law, a taxpayer has the unrestricted right to withdraw funds from the account, "it is inconceivable that Congress . . . intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor." *United States* v. *First National Bank of Arizona*, 348 F. Supp., at 389. Accord, *United States* v. *Citizens & Southern National Bank*, 538 F. 2d, at 1107.[10] The taxpayer's right to withdraw is analogous in this sense to the IRS's right to levy on the property and secure the funds. Both actions are similarly provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.

III

The Court of Appeals, however, applied state law beyond the point of that law's specification of the nature of the property right, and bound the IRS to certain consequences of state property law. Because under Arkansas garnishment law, a creditor of a depositor is not subrogated to the depositor's power to withdraw the account, the court reasoned that the IRS, too, could not stand in the depositor's shoes. This gloss, it seems to us, is contrary to the analysis and holding in *United States* v. *Bess*, 357 U. S. 51 (1958). The Court of Appeals adduced three principal justifications for its result. The first was its belief that under Arkansas law Roy did not have a sufficient property interest in the funds to support the levy. The second was its concern that Ruby and Neva might possess competing claims to the funds on deposit, and that the bank might be subject to claims asserted by them. The third was its stated conclusion that "levy is not normally

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[10] We stress the narrow nature of our holding. By finding that the right to withdraw funds from a joint bank account is a right to property subject to administrative levy under § 6331, we express no opinion concerning the federal characterization of other kinds of state-law created forms of joint ownership. This case concerns the right to levy only upon joint bank accounts.

intended for use as against property . . . bearing on its face the names of third parties, and in which those third parties likely have a property interest." 726 F. 2d, at 1300.

We are not persuaded by any of these asserted justifications.

The Court of Appeals' conclusion that Roy did not possess "property [or] rights to property" on which the IRS could levy rested heavily on its understanding of the Arkansas law of creditors' rights, particularly those in garnishment. *Id.*, at 1295–1296. See *Hayden* v. *Gardner*, 238 Ark. 351, 381 S. W. 2d 752 (1964). As we have suggested, this misconceives the role properly played by state law in federal tax-collection matters. The question whether a state-law right constitutes "property" or "rights to property" is a matter of federal law. *United States* v. *Bess*, 357 U. S., at 56–57. Thus, the facts that under Arkansas law Roy's creditors, unlike Roy himself, could not exercise his right of withdrawal in their favor and in a garnishment proceeding would have to join his codepositors are irrelevant. The federal statute relates to the taxpayer's rights to property and not to his creditors' rights. The Court of Appeals would remit the IRS to the rights only an ordinary creditor would have under state law. That result "compare[s] the government to a class of creditors to which it is superior." *Randall* v. *H. Nakashima & Co.*, 542 F. 2d 270, 274, n. 8 (CA5 1976).

The Court of Appeals also was concerned that Ruby and Neva might have rights that are affected if the levy were honored. 726 F. 2d, at 1297–1300. This reasoning, however, runs counter to the observation above that a bank served with a notice of levy has two, and only two, possible defenses for failure to comply with the demand: that it is not in possession of property of the taxpayer, or that the property is subject to a prior judicial attachment or execution. As we have stated, neither defense is applicable here. That another party or parties may have competing claims to the accounts is not a legitimate statutory defense.

In its understandable concern for Ruby's and Neva's property interests, the Court of Appeals has ignored the statutory scheme established by Congress to protect those rights. Crucially, the administrative levy, as has been noted, is only a provisional remedy. "The final judgment in [a levy] action settles no rights in the property subject to seizure." *United States* v. *New England Merchants National Bank*, 465 F. Supp. 83, 87 (Mass. 1979). Other claimants, if they have rights, may assert them. Congress recognized this when the Code's summary-collection procedures were enacted, S. Rep. No. 1708, 89th Cong., 2d Sess., 29 (1966), and when it provided in § 7426 of the Code, 26 U. S. C. § 7426, that one claiming an interest in property seized for another's taxes may bring a civil action against the United States to have the property or the proceeds of its sale returned.[11] Congress also has provided, by § 6343(b), an effective and inexpensive administrative remedy for the return of the property. See

[11] The dissent would find support in *United States* v. *Stock Yards Bank of Louisville*, 231 F. 2d 628 (CA6 1956), and *Raffaele* v. *Granger*, 196 F. 2d 620 (CA3 1952). See *post*, at 743, n. 8. Both cases are clearly distinguishable. *Stock Yards Bank* concerned an attempted levy upon United States savings bonds, held in the names of husband and wife, to satisfy the husband's tax liability. Savings bonds, however, are different from joint bank accounts and possess "limitations and conditions . . . which are delineated by the terms of the contract and by federal law." 231 F. 2d, at 630. Furthermore, the case was decided prior to the enactment of § 7426, which was added to the Internal Revenue Code by the Federal Tax Lien Act of 1966, § 110(a), 80 Stat. 1142.

Raffaele v. *Granger* is even less on point. The decision there did not concern the propriety of a provisional remedy, but the final ownership of the property in question. The court held that under Pennsylvania law a husband and wife's joint bank account was held by them together as tenants by the entirety, and that therefore the Government could not use the money in the account to satisfy the tax obligations of one spouse. The fact that either spouse could withdraw the property did not mean that it could be used to satisfy either spouse's tax obligations. 196 F. 2d, at 622–623. The Government here does not claim otherwise; it merely asserts the right to levy on such property and have all third parties who claim to own it come forward and make their claim.

Treas. Reg. § 301.6343–1(b)(2), 26 CFR § 301.6343–1(b)(2) (1984).[12]

Congress thus balanced the interest of the Government in the speedy collection of taxes against the interests of any claimants to the property, and reconciled those interests by permitting the IRS to levy on the assets at once, leaving ownership disputes to be resolved in a postseizure administrative or judicial proceeding. See *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F. 2d 733, 739 (CA5 1980); *Valley Finance, Inc.* v. *United States*, 203 U. S. App. D. C. 128, 136–137, 629 F. 2d 162, 170–171 (1980), cert. denied *sub nom. Pacific Development, Inc.* v. *United States*, 451 U. S. 1018 (1981). Its decision that certain property rights must yield provisionally to governmental need should not have been disregarded by the Court of Appeals. Nor would the bank be exposed to double liability were it to honor the IRS levy. The Code provides administrative and judicial remedies for codepositors against the Government, and any attempt to secure payment in this situation from the bank itself would be contrary to the federal enforcement scheme.[13]

The Court of Appeals' final justification for its holding was its belief that an IRS levy "is not normally intended for use as

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[12] We do not pass upon the constitutional questions that were addressed by the District Court, but not by the Court of Appeals, concerning the adequacy of the notice provided by § 6343(b) and § 7426 to persons with competing claims to the levied property. There is nothing in the sparse record in this case to indicate whether Ruby and Neva Reeves were on notice as to the levy, or as to what the Government's practice is concerning the notification of codepositors in this context. As the parties are free to address this issue on remand, the dissent's concerns on this score, see *post*, at 747–748, are decidedly premature.

[13] As a result, it may well be that any attempt to recover against the bank under state law would be pre-empted. We need not resolve that question, however, for, under Arkansas law, the bank's payment to one depositor was a complete defense against suit on a codepositor's claim. Ark. Stat. Ann. §§ 67–521, 67–552 (h) (1980). Since the Government stood in Roy's shoes when it levied upon the joint account, the bank's payment to the IRS would likewise insulate the bank from actions by Roy's codepositors.

against property in which third parties have an interest" or "as against property bearing on its face the names of third parties, and in which those third parties likely have a property interest." 726 F. 2d, at 1300. The court acknowledged the existence of § 7426 but felt that that statute was designed to protect only those third parties "whose property has been seized 'inadvertently.'" 726 F. 2d, at 1300.

We disagree. The IRS's understanding of the terms of the Code is entitled to considerable deference. Here, moreover, collection provisions plainly contemplate that a taxpayer's interest in property may be less than full ownership. The tax lien attaches not only to "property" but also to "rights to property." See S. Rep. No. 1708, at 29. Further, we see nothing in the language of § 7426 that distinguishes among various species of third-party claimants. The language of the statute encompasses advertent seizures as well as inadvertent ones.[14] There is nothing express or

[14] The dissent's central argument apes the decision of the Court of Appeals in suggesting that there is something in the language of § 6331 that, when compared to the language of § 7403, requires that it be read to apply only to the case where the Government has proof that the property levied upon "*completely* belong[s]" to the delinquent. See *post*, at 741 (emphasis added). The adverb, however, simply is not part of the statutory language. The dissent bases its reading on the contrast between the language in § 7403, "property . . . in which [the delinquent] has any right, title, or interest," with the language in § 6331, "property and rights to property . . . belonging to the delinquent." See *post*, at 737–741. While the dissent's reading of the statutes in contrast is plausible, so too is the Government's, especially in light of the fact that § 6331 refers to "rights to property" as well as "property." The legislative history also supports the agency's understanding of the statutory language. Thus when Congress in § 7426 enacted a cause of action for one whose property was wrongfully levied, it explicitly recognized that it was protecting against the situation "where the Government levies on property which, *in part at least*, a third person considers to be his." S. Rep. No. 1708, 89th Cong., 2d Sess., 29 (1966) (emphasis added). If Congress intended § 6331 to give the Government the power to levy only upon property it knows to be wholly owned by the delinquent, it never would have felt the need to enact § 7426. When the agency's plausible interpretation of its statute is supported by the plain meaning of the statute, the statutory scheme as a whole, and the

implied in *United States* v. *Rodgers*, 461 U. S. 677 (1983), to the contrary.

Rodgers held that § 7403 empowers a district court to order the sale of a family house in which a delinquent taxpayer has an interest, even though a nondelinquent spouse also has a homestead interest in the house under state law. 461 U. S., at 698–700. In so ruling, the Court contrasted the operation of § 7403 with that of § 6331. See 461 U. S., at 696. The Court noted that § 6331, unlike § 7403, does not "implicate the rights of third parties," because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property. Instead, third parties whose property is seized in an administrative levy "are entitled to claim that the property has been 'wrongfully levied upon,' and may apply for its return either through administrative channels . . . or through a civil action." *Ibid.* The Court, in other words, recognized what we now make explicit: that § 6331 is a *provisional* remedy, which does not determine the rights of third parties until *after* the levy is made, in postseizure administrative or judicial hearings.[15]

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legislative history, we shall not reject it because another plausible reading of the statute is possible.

The dissent also is incorrect when it implies that the Court gives the word "wrongful" a strained understanding in finding that a third party's property could be "wrongful[ly]" levied even though the Government properly was following the procedures of § 6331. See *post*, at 746, n. 11. The legislative history makes clear that the word "wrongful" as it is used in § 7426(a) refers not to intentional wrongdoing on the Government's part, but rather "refers to a proceeding against property which is not the taxpayer's." S. Rep. No. 1708, at 30.

[15] The dissent's misreading of *Rodgers* is of a piece with its misunderstanding of the Government's use of § 6331 as a provisional remedy to seize property. See *post*, at 740–743, and n. 6. The reason that § 6331 is not itself "punctilious in protecting the vested rights of third parties caught in the Government's collection effort," *Rodgers*, 461 U. S., at 699, is that the levy does not purport to determine any rights to the property. It merely protects the Government's interests so that rights to the property may be determined in a postseizure proceeding. It is in those proceedings that the rights of any who claim an interest to the property are punc-

The Court of Appeals' result would force the IRS, if it wished to pursue a delinquent taxpayer's interest in a joint bank account, to institute a lien-foreclosure suit under § 7403, joining all codepositors as defendants. The practical effect

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tiliously protected. In comparing § 6331 to § 7403 in this manner, the dissent compares apples and oranges. A more telling comparison to the lien-foreclosure proceeding of § 7403 would be with the administrative and judicial remedies for third parties whose property has been subject to wrongful levy, that is, with §§ 6343(b) and 7426(a)(1). It was just such a comparison that was made in this context by the Court in *Rodgers*. See *id.*, at 696.

Nor is *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326 (1890) (which not surprisingly was not relied on by the District Court or the Court of Appeals or by any of the parties here), in any way related to our holding today. That case involved provisions of the 1868 Tax Code that required a distiller who rented the property upon which it ran its distillery to obtain a "waiver" from the feeholder stipulating that a lien of the United States on the property for taxes owed by the distiller shall have priority over any mortgage held by the person executing the waiver, and giving the Government the rightful title to the property in case of forfeiture. Act of July 20, 1868, ch. 186, § 8, 15 Stat. 128. See 135 U. S., at 328–329, 338–339. The Court held that this waiver did not entitle the Government to treat the property as if it belonged to the distiller for purposes of the then Tax Code's levy provisions. *Id.*, at 338. The waiver, the Court held, did not give the distiller a fee interest in the premises, nor did it give the Government the right to anything more than a first or prior lien. *Id.*, at 339.

That holding is irrelevant to the present controversy. Insofar as the case stands for any general proposition at all concerning the Government's power to levy, it is *not* that a levy cannot be used to freeze assets when the delinquent "had less than a complete interest" in the property levied, see *post*, at 738, but that the Government may not levy upon a leasehold interest and then turn around and sell a fee interest—an entirely different kind of interest. In *Mansfield*, the Court held that the delinquent held no interest in the fee that could be levied upon, and so that case has nothing to do with the question whether the Government can levy when the extent of the delinquent's interest in the property is not finally determined. The part of the decision relied upon by the dissent has to do with the nature of the "waiver" as it affects the characterization of the interest held by the renter/distiller in the underlying fee. The phrase cited by the dissent in context stands for the proposition that the waiver did not give the delinquent a fee interest that the Government could levy upon, but rather gave the Government the right to foreclose on its lien through a suit in equity.

of this would be to eliminate the alternative procedure for administrative levy under §§ 6331 and 6332. We do not lightly discard this alternative relief that Congress so clearly has provided for the Government. If the IRS were required to bring a lien-foreclosure suit each time it wished to execute a tax lien on funds in a joint bank account, it would be uneconomical, as a practical matter, to do so on small sums of money such as those at issue here. And it would be easy for a delinquent taxpayer to evade, or at least defer, his obligations by placing his funds in joint bank accounts. While one might not be enthusiastic about paying taxes, it is still true that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull* v. *United States*, 295 U. S. 247, 259 (1935).

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE POWELL, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

The issue presented is whether the Internal Revenue Service (IRS) may lawfully seize a joint bank account for payment of a single codepositor's delinquent taxes when it does not know how much, if any, of the account belongs to the delinquent. As it seems to me that the Court today misreads the relevant statutory language, in effect overrules prior decisions of this Court, and substantially ignores the property rights of nondelinquent taxpayers, I dissent.

I

The parties have stipulated the following facts. On June 13, 1980, respondent bank held $321.66 in a checking account and $1,241.60 in a savings account, each in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves." App. 11–12. Under state law and by contract with the bank, each of these individuals could withdraw any amount from either account. Also on June 13, the IRS served a notice of levy on the bank demanding that it pay over all sums owed to Roy J. Reeves

up to $1,302.56, the balance of a tax assessment against him. It later issued a partial release of levy for moneys in excess of $856.61 and served a final demand for payment on the bank. The bank, however, refused to pay over this amount because it did not know how much of the money in the accounts belonged to Roy Reeves as opposed to Ruby and Neva. The Government, to enforce its levy, then sued the bank for $856.61. Before the District Court the parties agreed to submit "[n]o further evidence as to the ownership of the monies in the subject bank accounts . . . ." App. 17. As a result, neither the Government nor the Court knows how much of the funds in each account was owned by each codepositor.

The District Court dismissed the complaint as "premature." 554 F. Supp. 110, 117 (ED Ark. 1982). It held that "the interest of [a] co-depositor in not having his ownership interest in the account erroneously taken by the government . . . [required] some notice procedure at the levy stage . . . ." *Id.*, at 114. Due process, it found, required the IRS to give codepositors notice of the levy action before seizing the accounts. *Id.*, at 114–115. The Court of Appeals for the Eighth Circuit affirmed without expressing any opinion on the District Court's due process analysis. 726 F. 2d 1292 (1984). Instead, it reached a similar result as a matter of statutory construction. In particular, it held that the Government had not shown the bank to be in possession of property or rights to property belonging to the tax delinquent, as the levy statute requires.

II

Because "taxes are the life-blood of government, and their prompt and certain availability an imperious need," *Bull* v. *United States*, 295 U. S. 247, 259 (1935), Congress has created a "formidable arsenal of collection tools . . . ," *United States* v. *Rodgers*, 461 U. S. 677, 683 (1983). Central to this "arsenal" are administrative levy, 26 U. S. C. § 6331, and judicial foreclosure, § 7403, two procedures by which the Government can seize and sell property in which the delinquent taxpayer has an interest. Each procedure is designed

to apply to specific kinds of situations to ensure that taxes owed are paid while respecting the rights of nondelinquents who may have an interest in the property.

The Court today, however, ignores the property rights of nondelinquents. It holds that a delinquent's right to compel payment from a bank of balances in a joint account entitles the Government to levy on all of those funds—even when it is stipulated, as in this case, that the Government does not know that *any* of the money in the account actually belongs to the delinquent. By so holding, the Court disregards both the plain language and structure of the statute, ignores this Court's century-long interpretation of the Code (effectively overruling *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326 (1890), and part of *United States* v. *Bess*, 357 U. S. 51 (1958)), and disregards the fact that under Arkansas law a codepositor may have no property interest in funds that he may withdraw from the joint account.

III

Administrative levy under 26 U. S. C. § 6331 is the more drastic of the Government's two primary collection procedures.[1] See *Bull* v. *United States*, *supra*, at 259–260. By allowing the Government summarily to seize and sell "all property and rights to property . . . belonging to [the delinquent]," 26 U. S. C. § 6331(a), administrative levy permits the IRS to collect unpaid taxes without judicial intervention.

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[1] Section 6331 provides in pertinent part:

"(a) Authority of Secretary

"If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . . .

"(b) Seizure and sale of property

"The term 'levy' . . . includes the power of distraint and seizure by any means. . . . In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible)."

It is a "summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims." *United States* v. *Sullivan*, 333 F. 2d 100, 116 (CA3 1964). It provides no notice to third parties that property in which they may have an interest has been seized. If an individual discovers a levy and believes that it was wrongful, his or her only recourse is to seek administrative review under 26 U. S. C. § 6343(b) within nine months[2] or file suit in federal district court under 26 U. S. C. § 7426(a)(1) within the same amount of time.[3]

Section 7403 provides a quite different method for collecting delinquent taxes.[4] Under § 7403, the Attorney General,

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[2] Section 6343(b) states in pertinent part:

"If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return—

"(1) the specific property levied upon,

"(2) an amount of money equal to the amount of money levied upon, or

"(3) an amount of money equal to the amount of money received by the United States from a sale of such property.

"Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy."

[3] Section 7426(a)(1) provides as follows:

"If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary."

Section 6532(c)(1) requires third parties who are not seeking administrative review to file suit within nine months of the levy.

[4] Section 7403 provides in pertinent part as follows:

"(a) Filing

"In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect

at the request of the Secretary of the Treasury, institutes a civil action in federal district court "to subject any property . . . in which [the delinquent] has any right, title, or interest, to the payment of such tax." 26 U. S. C. § 7403(a). All persons "claiming any interest in the property" must be joined as parties, § 7403(b), and "duly notified of the action," § 7403(c). Unlike a § 6331 levy, a § 7403 suit is a plenary action in which the court "adjudicate[s] all matters involved" and "finally determine[s] the merits of all claims to and liens upon the property." § 7403(c). The district court may decree the sale of the property and distribution of the proceeds "according to the findings of the court in respect to the interests of the parties and of the United States." *Ibid.*

The language of these two provisions reveals the central difference between them. While § 6331 applies to "property and rights to property . . . belonging to [the delinquent]," § 6331(a), § 7403 applies to "property . . . in which [the delinquent] has any right, title, or interest . . . ," § 7403(a). In other words, § 6331 permits seizure and sale of property or property rights *belonging to* the delinquent, while § 7403 allows the Government to seize and sell any property right in which the delinquent has an interest—even a *partial* interest. In many cases, of course, this difference is unimportant. Both procedures, for example, apply to any property

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to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. . . .

"(b) Parties

"All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

"(c) Adjudication and decree

"The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property . . . and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. . . ." 26 U. S. C. § 7403.

interest that belongs completely to the delinquent, for it is necessarily true that any right to property "belonging to" the delinquent is also property in which he "has a[n] . . . interest." In general, however, the opposite is not always true. A property right in which the delinquent has only a partial interest does not "belon[g] to" the delinquent and hence is not susceptible to levy.

Until today, this Court has followed this interpretation of the levy and foreclosure provisions for the past century. In *Mansfield* v. *Excelsior Refining Co.*, 135 U. S. 326 (1890), the Court held that the Government could not levy on property rights in which a delinquent had less than a complete interest. In that case, the Government had levied on the fee interest in property that the delinquent had leased for a term of years. One issue presented was whether the Government's subsequent sale of the property conveyed the freehold or only the leasehold interest. The first Justice Harlan analyzed the issue as follows:

> "The government neglected to pursue the only mode by which the fee could be sold; namely, a suit in equity, in which all persons interested in the property could have been made parties. When the [delinquent] was in default in respect to taxes, it was for the proper officers of the government to elect whether they would seek satisfaction of its demands by means of a seizure and sale by the collector of the [delinquent's] interest only, or by a suit to which all persons having claims upon the premises on which the government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the delinquent . . . could be seized and sold." *Id.*, at 341.

In other words, the Government could have either levied administratively only on the leasehold or proceeded in equity (the forerunner of § 7403) to condemn the entire freehold interest. Under the former approach, it could take only the interest that completely "belong[ed] to" the delinquent, while

under the latter, it could take property interests of which the delinquent owned only a part.[5] Accord, *Blacklock* v. *United States*, 208 U. S. 75 (1908).

In *United States* v. *Rodgers*, 461 U. S. 677 (1983), we recently reaffirmed this understanding of the statutory scheme. After noting that § 7403 exhibits "grea[t] solicitude for third parties," *id.*, at 695, we discussed how §§ 6331 and 7403 differ:

> "Under . . . § 6331(a), the Government may sell for the collection of unpaid taxes all nonexempt 'property and rights to property . . . *belonging to [the delinquent taxpayer]* . . . .' Section 6331, unlike § 7403, does not require notice and hearing for third parties, *because no rights of third parties are intended to be implicated by § 6331.* Indeed, third parties whose property or interests in property have been seized inadvertently are entitled to claim that the property has been 'wrongfully levied upon,' and may apply for its return either through administrative channels . . . or through a civil action filed in a federal district court. . . . In the absence of such 'wrongful levy,' the entire proceeds of a sale conducted pursuant to administrative levy may be applied, without any prior distribution of the sort required by

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[5] The Court argues that *Mansfield* is irrelevant to today's decision because it stands for the unremarkable proposition that "the Government may not levy upon a leasehold interest and then turn around and sell a fee interest—an entirely different kind of interest." *Ante*, at 732, n. 15. It bases this reading of *Mansfield* on the presence of a waiver from the feeholder, which was in fact tangential to the Court's holding in that case. The Court in *Mansfield* discussed the feeholder's waiver only in order to determine whether it gave the Government an interest in the fee. 135 U. S., at 338–339. If it did, it was clear that the Government could sell the fee. The Court, however, concluded that the waiver gave the Government no such interest. *Id.*, at 339. Thus, the Court had to consider whether the levy on the property could *by itself* effectively transfer more than the delinquent's leasehold interest. Justice Harlan, writing for the *Mansfield* Court, found that the levy could not, and it is in this respect that *Mansfield* is a highly pertinent—if not a controlling—authority.

> § 7403, to the expenses of the levy and sale, the specific tax liability on the seized property, and the general tax liability of the delinquent taxpayer." *Id.*, at 696 (first emphasis in original, second added).

The Court later described the various advantages of each method of tax collection as follows:

> "Among the advantages of administrative levy is that it is quick and relatively inexpensive. Among the advantages of a § 7403 proceeding is that it gives the Federal Government the opportunity to seek the highest return possible on the forced sale of property interests liable for the payment of federal taxes. The provisions of § 7403 are broad and profound. *Nevertheless, § 7403 is punctilious in protecting the vested rights of third parties caught in the Government's collection effort,* and in ensuring that the Government not receive out of the proceeds of the sale any more than that to which it is properly entitled." *Id.*, at 699 (emphasis added).[6]

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[6] The Court attempts to minimize the conflict between its holding today and the holding in *Rodgers* by mischaracterizing that case. The Court states that "[t]he *[Rodgers]* Court noted that § 6331, unlike § 7403, does not 'implicate the rights of third parties,' because an administrative levy, unlike a judicial lien-foreclosure action, does not determine the ownership rights to the property." *Ante*, at 731. Nothing in *Rodgers*, however, suggests that § 6331 is not intended to implicate third-party rights for this reason. As the first quotation from *Rodgers* in the text above clearly indicates, § 6331 is not meant to implicate such rights because its explicit language limits levies for "unpaid taxes [to] all nonexempt 'property and rights to property . . . *belonging to [the delinquent taxpayer]* . . .'" (emphasis in *Rodgers*).

The Court also argues that comparing § 6331 and § 7403 is like comparing "apples and oranges." *Ante*, at 732, n. 15. It suffices to say that this Court always has relied on comparison of these two provisions. See *United States* v. *Rodgers*, 461 U. S., at 695–697; *Mansfield* v. *Excelsior Refining Co.*, 135 U. S., at 341. Furthermore, the "more telling" comparison that the Court believes *Rodgers* made between § 7403 and a wrongful-levy action, see *ante*, at 731–732, n. 15, actually works against today's

As *Mansfield* and *Rodgers* make clear, this Court long has interpreted "property and rights to property *belonging to* the delinquent" to mean exactly that. Section 6331's reach extends only to property rights completely belonging to the delinquent.

IV

The narrow question presented, then, is whether the Government levied upon property or rights to property belonging only to Roy Reeves. The Court holds that the Government did so because it levied on Roy Reeves' right under state law to require the bank to pay over to him the outstanding balances in the accounts. This right unquestionably belonged to Roy Reeves, as it did to each of the other codepositors. They all had the same right to withdraw. But the right to withdraw funds was no more than that. It was a right accorded parties to joint accounts as a matter of mutual convenience, and it was independent of any right *to* or *in* the property. It encompassed no right of possession, use, or ownership over the funds when withdrawn. See *Black* v. *Black*, 199 Ark. 609, 617, 135 S. W. 2d 837, 841 (1940); *Hayse* v. *Hayse*, 4 Ark. App. 160–B, 160–F, 630 S. W. 2d 48, 49–50 (1982). These property rights, which the levy provides no way of determining, are defined by independent principles of Arkansas law that are not now at issue.[7]

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result. By stating that wrongful-levy actions can be pursued when "property ha[s] been seized inadvertently," 461 U. S., at 696, the *Rodgers* Court makes clear its assumption that the Government cannot levy on property it knows may belong to third parties. The reasoning of the Court today, however, would allow exactly this result.

[7] The Arkansas Supreme Court has described the statute granting codepositors the right to withdraw in the following terms:

"[The statute was] passed for the protection of the bank in which the deposit was made. It permits the bank to pay out the deposit . . . and protects the bank in doing so. . . . The statute[, however,] effects no investiture of title as between the depositors themselves, but only relieves the bank of the responsibility and duty of making inquiry as to the respec-

The Government, however, is not levying on the mere right to withdraw, which is of little value without any right of ownership. The levy at issue reaches the underlying funds in the accounts—no matter whom they belong to. Roy Reeves could, as the Court argues, have withdrawn all the joint funds, but, if under state law he had no independent right in the property itself, he could not legally possess the funds of the others, let alone use them to pay *his* taxes. That the delinquent might unlawfully convert the money of others to pay his taxes does not give the Government the right to do so. The Government cannot "'"ste[p] into the taxpayer's shoes,"'" *ante*, at 725, quoting *United States* v.

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tive interests of the depositors in the deposit . . . ." *Black* v. *Black*, 199 Ark. 609, 617, 135 S. W. 2d 837, 841 (1940).

The Court of Appeals accepted this characterization of Arkansas law and described the interrelationship between the right to withdraw and the underlying property rights as follows:

"Roy [Reeves] could have withdrawn any amount he wished from the account and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank. But they might have had a claim against Roy for conversion. The rights of the co-owners *inter sese* are not determined by the . . . Arkansas statutes [granting a right of withdrawal]. Those rights depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners, or on some other applicable rule of state law. If, for example, a spouse makes a deposit in a bank account that bears both spouses' names, a tenancy by the entirety is created, defeasible by either spouse at will simply by making a withdrawal. But here we do not know whether Roy is married to Ruby or Neva. In fact, both the government and the bank have studiously avoided finding out. . . . In short, we know, or presume, that each co-owner could withdraw all of both accounts, *but that is all we know*." 726 F. 2d 1292, 1295 (CA8 1984) (citation omitted) (emphasis added).

The Court accepts, as it must, the state court's determination of Arkansas law. It simply holds that federal law overrides it, despite what this Court has held in *Aquilino* v. *United States*, 363 U. S. 509, 513 (1960), quoting *Morgan* v. *Commissioner*, 309 U. S. 78, 82 (1940); *United States* v. *Bess*, 357 U. S. 51, 55 (1958); see *ante*, at 726–729.

Rodgers, 461 U. S., at 691, n. 16, in this sense. It hardly comports with the "[c]ommon sense" the Court relies on, *ante*, at 725, to hold that the Government may seize and sell property belonging only to third parties to pay taxes owed by the delinquent.[8]

The Court nevertheless holds that the right to withdraw all of a joint account is determinative because "'it is inconceiv-

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[8] The Courts of Appeals that have considered whether the IRS can levy on jointly held property to pay a co-owner's taxes have held that it cannot when it does not know how much of the property actually belongs to the delinquent. In *United States* v. *Stock Yards Bank of Louisville*, 231 F. 2d 628 (CA6 1956), Justice (then Judge) Stewart, writing for the court, held that a joint bondholder's right to present a bond for redemption, receive payment in full, and thereby eliminate completely the other co-owner's interest as far as the issuer was concerned did not give the IRS the right to levy on the entire bond to pay one co-owner's taxes. "Proof of the actual value of the taxpayer's interest was an essential element of the government's case under the statute, and for lack of such proof the case falls." *Id.*, at 631. The Court attempts to distinguish this case on the ground that "[s]avings bonds . . . are different from joint bank accounts . . . ." *Ante*, at 728, n. 11. In *Stock Yards Bank*, however, the Court of Appeals expressly analogized savings bonds to joint bank accounts, 231 F. 2d, at 631, and the Court today points to no relevant distinguishing feature. It merely creates a distinction without a difference.

Likewise, in *Raffaele* v. *Granger*, 196 F. 2d 620 (CA3 1952), the Court of Appeals rejected the IRS's view that it could levy on joint bank accounts held as tenancies by the entirety when "either spouse may draw upon them." *Id.*, at 622. The court found that the "power of each spouse to withdraw funds," which the IRS argued was determinative, *ibid.*, was actually irrelevant because under state law "the ownership of both [spouses] attaches to funds withdrawn by either," *ibid.* "The United States," it held, "has no power to take property from one person, the innocent spouse, to satisfy the obligation of another." *Id.*, at 623. The Court attempts to distinguish this case on the ground that it "did not concern the propriety of a provisional remedy, but the final ownership of the property in question." *Ante*, at 728, n. 11. This is misleading. In *Raffaele*, the Court of Appeals affirmed the District Court's quashing of a warrant of distraint. It thus held that the IRS had no right to seize the property as an initial matter. It did not hold that the IRS had properly seized the property but had to return it.

able that Congress . . . intended to prohibit the Government from levying on that which is plainly *accessible* to the delinquent taxpayer-depositor.'"[9] *Ante*, at 726, quoting *United*

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[9] The Court today states that "[t]he overwhelming majority of courts that have considered the issue have held that a delinquent taxpayer's unrestricted right to withdraw constitutes 'property' or 'rights to property' subject to provisional IRS levy, regardless of the facts that other claims to the funds may exist and that the question of ultimate ownership may be unresolved at the time." *Ante*, at 724–725. Insofar as the Court states that the IRS can levy on the right to withdraw, one can assume, without deciding, that it is correct, because the statement is irrelevant. In the present case, the IRS is not levying on the right to withdraw, but on the underlying right in the property, which may well belong to innocent third parties. See *supra*, at 741–743. On the other hand, insofar as the Court states that "these cases all stand for the proposition that a delinquent's state-law right to withdraw funds from [a] joint bank account is a property interest sufficient for purposes of federal law for the Government to levy the account . . . ," *ante*, at 725, n. 9, it is simply mistaken. *Not one, let alone "all," of these cases stand for this proposition.* The cases the Court cites from the Courts of Appeals, the District Courts, and the Tax Court either decide a different question or actually support the position taken by the Third and Sixth Circuits, see n. 5, *supra*. Four of the Court of Appeals cases and one of the District Court cases concern the amount of "property" in an individual's account when the bank has either an unexercised right of setoff or checks still to be drawn against the account at the time of the levy. *Citizens & Peoples National Bank* v. *United States*, 570 F. 2d 1279 (CA5 1978) (unpaid checks); *United States* v. *Citizens & Southern National Bank*, 538 F. 2d 1101 (CA5 1976) (unexercised right of setoff), cert. denied, 430 U. S. 945 (1977); *United States* v. *Sterling National Bank & Trust Co.*, 494 F. 2d 919 (CA2 1974) (same); *Bank of Nevada* v. *United States*, 251 F. 2d 820 (CA9 1957) (same), cert. denied, 356 U. S. 938 (1958); *United States* v. *First National Bank of Arizona*, 348 F. Supp. 388 (Ariz. 1970) (same), aff'd, 458 F. 2d 513 (CA9 1972). The fifth Court of Appeals case, the other District Court case, and all the Tax Court cases support a holding opposite to the Court's today. In *Babb* v. *Schmidt*, 496 F. 2d 957 (CA9 1974), for example, the court allowed the levy against community property only because state law "ha[d] . . . given the [delinquent] rights in that property . . . ." *Id.*, at 960. And in the other District Court case and all the Tax Court cases the court found that state law gave the delinquent not only a right of withdrawal but also a right of use or possession in the underlying funds themselves. *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152, 155 (MD Pa. 1953) (delinquent was either sole owner of

States v. *First National Bank of Arizona*, 348 F. Supp. 388, 389 (Ariz. 1970) (emphasis added), aff'd, 458 F. 2d 513 (CA9 1972) *(per curiam)*. By holding that mere accessibility controls, the Court simply ignores the plain language of § 6331. It also effectively overrides state law that " 'controls in determining the nature of the legal interest which the taxpayer ha[s] in the property.'"[10] *Aquilino* v. *United States*,

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funds or joint tenant); *United States* v. *Equitable Trust Co.*, 49 AFTR 2d ¶ 82–428, at 82–725 (Md. 1982) ("[P]rior to the federal tax levy, both [co-depositors] owned the accounts as joint tenants, each having the absolute right to use or withdraw the entire fund. . . . Consequently, [the delinquent codepositor] had property rights in the checking account . . . ."); *Sebel* v. *Lytton Savings & Loan Assn.*, 65–1 USTC ¶ 9343 (SD Cal. 1965) (joint tenancy); *Tyson* v. *United States*, 63–1 USTC ¶ 9300 (Mass. 1962) (holding in the alternative that assessment was jointly against both co-depositors or that state law granted any creditor the right to possession of either codepositor's funds).

These cases should also dispel the Court's fear that the IRS will be forced to "bring a lien-foreclosure suit each time it wishe[s] to execute a tax lien on funds in a joint bank account . . . ." *Ante*, at 733. Nothing in my opinion suggests that under existing federal law the IRS can *never* levy on a joint bank account. As the cited cases make clear, many, if not most, States give codepositors property rights in *all* the funds in a joint account. As long as state law grants such a right—which Arkansas law does not, see n. 7, *supra*—levy on all the funds to pay a single codepositor's taxes is proper. It is only when state law does not grant such a right that the IRS should not be allowed to levy under § 6331 without first determining that the funds "belong to" the delinquent. The Court's position, however, would permit levies even when the IRS knows that none of the funds in the account belongs to the delinquent taxpayer.

[10] At several points, the Court mischaracterizes my reliance on state law. I do not suggest that because state law "puts certain limits on the rights of creditors, and attaches certain consequences to [the right to withdraw] as regards the delinquent himself . . . the Government is limited by these same state-law constraints." *Ante*, at 724, n. 8. Nor do I suggest that "state law dictates the extent of the Government's power to levy." *Ante*, at 725, n. 9. These are strawmen that the Court long ago rejected. *United States* v. *Bess*, 357 U. S., at 56–57. Like the Court, I would follow the statement in *Bess* that § 6331 "creates no property rights but merely attaches consequences, federally defined, *to rights created under state law* . . . ." *Id.*, at 55 (emphasis added). As the Court today states, "under *Bess*, state law controls only in determining the nature of the legal

363 U. S. 509, 513 (1960), quoting *Morgan* v. *Commissioner*, 309 U. S. 78, 82 (1940); *United States* v. *Bess*, 357 U. S., at 55. Under the Court's reasoning, for example, a codepositor's right to withdraw would allow the Government to levy on a joint account even if the Government knew that under state law none of the funds in the joint account "belonged to" the delinquent codepositor, *i. e.*, the delinquent had *no* property interest in the funds themselves.[11] Cf. *Aquilino* v. *United States*, *supra*, at 513, n. 3 ("It would indeed be anomalous to say that the taxpayer's 'property and rights to property' included property in which, under the relevant state law, he had no property interest at all"). Such a position exceeds even the IRS's own interpretation of its

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interest which the taxpayer has in the property." *Ante*, at 724, n. 8. Here, however, the delinquent taxpayer may have *no* legal interest in the property. All that is known is that he has a right of withdrawal that is completely independent of the funds themselves. See n. 7, *supra*. Nevertheless, the Court attaches "federal consequences" sufficient to levy on the accounts. In effect, what the Court holds today is that the delinquent's right against the bank creates "federal consequences" that attach to the completely different right to the funds themselves. By so construing the "federal consequences" of *Bess*, the Court does nothing less than rewrite § 6331, a provision that authorizes levy *only* on "property and rights to property belonging to" the delinquent.

[11] Moreover, if taken seriously, the Court's reasoning would make any action for wrongful levy fruitless. If the mere right to withdraw payment is indeed the determinative interest, then a levy on a joint account for payment of a codepositor's taxes can never be wrongful. It will always be true that a right to withdraw belonged to the delinquent codepositor. The Court, of course, does not actually take this extreme position. It would apparently allow a third party subsequently to contest a levy on the ground that "the money in fact *belongs to* him or her." *Ante*, at 726 (emphasis added). This, however, amounts to recognition that it is the right of ownership, rather than the right to withdraw, that controls. To avoid taking a transparently unreasonable position, the Court switches the basis of its analysis. The relevant property interest, it appears, depends upon whether the Government is trying to seize property or a third party is trying to recoup it. The Court offers no reason for applying this double standard, and the statute itself yields none.

levy powers. Rev. Ruling 55–187, 1955–1 Cum. Bull. 197 ("A joint checking account is subject to levy only to the extent of a taxpayer's interest therein, which will be determined from the facts in each case"). This position, moreover, effectively overrules not only *Mansfield* but also part of *United States* v. *Bess*, *supra*, a case in which this Court held that a delinquent could have no "property or right to property" in funds over which he had no right of possession. 357 U. S., at 55–56.

The Court also disregards the statutory language and its prior cases when it argues that the levy authorized by § 6331 is only a "provisional" remedy. *Ante*, at 715, 720, 726, and 728. Third parties who have their property taken may pursue—if they know about the taking—either administrative or judicial relief. But one would hardly characterize as "provisional" the Government's taking of an innocent party's property without notice, especially when, even if the taking is discovered, the burden is then on the innocent party to institute recovery proceedings.[12] Furthermore, absent notice of any kind, the nine months that the administrative, 26 U. S. C. § 6343(b), and judicial, 26 U. S. C. § 6532(c)(1), remedies ordinarily give third parties to contest a levy is a short time indeed. There is no certainty that within this time they will discover that their property has been used to pay someone else's taxes. This may be particularly true as

[12] The Court also argues that a levy on third-party property may be justified because "[the levy] merely protects the Government's interests so that rights to the property may be determined in a postseizure proceeding." *Ante*, at 731, n. 15. This statement incorrectly states the law. Under the levy statute, the IRS has the power not only to seize but also to sell property. 26 U. S. C. § 6331(b). A co-owner of a house seized and sold to pay a delinquent's taxes would indeed be surprised to discover that the IRS's levy "merely protects the Government's interests . . . ." Assuming that the co-owner discovered within nine months that the IRS had levied on the property (for no notice to him is required), he could recover in a wrongful-levy action at most some of the proceeds from the sale. This "remedy" hardly "punctiliously protect[s]" the rights of third parties, as the Court claims. *Ante*, at 731–732, n. 15.

to the owners of joint *savings* accounts, owners in common of unimproved real estate, and owners in other situations where there may be little occasion to know that one's property has been seized by an IRS levy. In short, the Court's decision often will place the property rights of third parties in serious jeopardy.[13]

V

On the stipulated facts, the IRS did not know what portion, if any, of the joint accounts levied upon "belong[ed] to" Roy Reeves. It knew only that he had a right to withdraw that under state law encompassed no right to the possession, use, or ownership of the funds when withdrawn. In allowing the levy under these circumstances, the Court today not only decides this case contrary to all of the relevant decisions of the Courts of Appeals but also effectively overrules *sub silentio* its own prior decisions. Moreover, the Court relies on remedies that, because no notice is provided, may in many cases prove ineffective in protecting the rights of third parties.[14]

I accordingly dissent, and would affirm the judgment of the Court of Appeals.

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[13] The Court also emphasizes that administrative levy is justified because, like the delinquent's right to withdraw, it is "subject to a later claim by a codepositor that the money in fact belongs to him or her." *Ante*, at 726. This statement proves too much. Under the Court's reasoning, the IRS could levy on anyone's property to pay anyone else's taxes because such wrongful seizures are nearly always "subject to a later claim by [the owner] that the [property] in fact belongs to him or her." The fact that every wrongful taking is subject to a subsequent claim for conversion does not justify the taking.

[14] The IRS may reach funds like these by following the procedure prescribed by § 7403. And, of course, Congress, if it wishes, may authorize collection of funds under a levy-type procedure, provided it observes constitutional requirements, particularly that of notice. As I would find the statutory language dispositive (as did the Court of Appeals), I do not address the due process claim relied on by the District Court.

Syllabus

DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC.

CERTIORARI TO THE SUPREME COURT OF VERMONT

No. 83–18. Argued March 21, 1984—Reargued October 3, 1984—Decided June 26, 1985

Petitioner credit reporting agency sent a report to five subscribers indicating that respondent construction contractor had filed a voluntary petition for bankruptcy. The report was false and grossly misrepresented respondent's assets and liabilities. Thereafter, petitioner issued a corrective notice, but respondent was dissatisfied with this notice and brought a defamation action in Vermont state court, alleging that the false report had injured its reputation and seeking damages. After trial, the jury returned a verdict in respondent's favor and awarded both compensatory or presumed damages and punitive damages. But the trial court believed that *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, controlled, and granted petitioner's motion for a new trial on the ground that the instructions to the jury permitted it to award damages on a lesser showing than "actual malice." The Vermont Supreme Court reversed, holding that *Gertz* was inapplicable to nonmedia defamation actions.

Held: The judgment is affirmed.

143 Vt. 66, 461 A. 2d 414, affirmed.

JUSTICE POWELL, joined by JUSTICE REHNQUIST and JUSTICE O'CONNOR, concluded that:

1. The fact that the jury instructions in question referred to "malice," "lack of good faith," and "actual malice," did not require the jury to find "actual malice," as respondent contends, where the instructions failed to define any of these terms. Consequently, the trial court correctly concluded that the instructions did not satisfy *Gertz*. Pp. 753–755.

2. Permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Pp. 755–763.

(a) In light of the reduced constitutional value of speech on matters of purely private concern, as opposed to speech on matters of public concern, the state interest in compensating private individuals for injury to their reputation adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice." Cf. *Gertz*. Pp. 755–761.

(b) *Gertz*, *supra*, does not apply to this case. Petitioner's credit report concerned no public issue but was speech solely in the individual

interest of the speaker and its specific business audience. This particular interest warranted no special protection when it was wholly false and damaging to the victim's business reputation. Moreover, since the credit report was made available to only five subscribers, who, under the subscription agreement, could not disseminate it further, it cannot be said that the report involved any strong interest in the free flow of commercial information. And the speech here, like advertising, being solely motivated by a desire for profit, is hardy and unlikely to be deterred by incidental state regulation. In any event, the market provides a powerful incentive to a credit reporting agency to be accurate, since false reporting is of no use to creditors. Pp. 761–763.

THE CHIEF JUSTICE concluded that *Gertz* is inapplicable to this case, because the allegedly defamatory expression involved did not relate to a matter of public concern, and that no other reason was needed to dispose of the case. Pp. 763–764.

JUSTICE WHITE concluded that *Gertz* should not be applied to this case either because *Gertz* should be overruled or because the defamatory publication in question did not deal with a matter of public importance. P. 774.

POWELL, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST and O'CONNOR, JJ., joined. BURGER, C. J., *post*, p. 763, and WHITE, J., *post*, p. 765, filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 774.

Gordon Lee Garrett, Jr., reargued the cause for petitioner. With him on the briefs were *Hugh M. Dorsey, Jr.*, *David J. Bailey*, *William B. B. Smith*, *Peter J. Monte*, and *A. Buffum Lovell.*

Thomas F. Heilmann reargued the cause and filed briefs for respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Robert M. Weinberg*, *George Kaufmann*, and *Laurence Gold;* for Dow Jones & Co., Inc., by *Robert D. Sack* and *Frederick T. Davis;* for the Information Industry Association by *Richard E. Wiley*, *Lawrence W. Secrest III*, *Michael Yourshaw*, and *Patricia M. Reilly;* and for the Washington Post by *David E. Kendall* and *Kevin T. Baine.*

William E. Murane filed briefs for Sunward Corp. as *amicus curiae* urging affirmance.

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE REHNQUIST and JUSTICE O'CONNOR joined.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the First Amendment restricted the damages that a private individual could obtain from a publisher for a libel that involved a matter of public concern. More specifically, we held that in these circumstances the First Amendment prohibited awards of presumed and punitive damages for false and defamatory statements unless the plaintiff shows "actual malice," that is, knowledge of falsity or reckless disregard for the truth. The question presented in this case is whether this rule of *Gertz* applies when the false and defamatory statements do not involve matters of public concern.

I

Petitioner Dun & Bradstreet, a credit reporting agency, provides subscribers with financial and related information about businesses. All the information is confidential; under the terms of the subscription agreement the subscribers may not reveal it to anyone else. On July 26, 1976, petitioner sent a report to five subscribers indicating that respondent, a construction contractor, had filed a voluntary petition for bankruptcy. This report was false and grossly misrepresented respondent's assets and liabilities. That same day, while discussing the possibility of future financing with its bank, respondent's president was told that the bank had received the defamatory report. He immediately called petitioner's regional office, explained the error, and asked for a correction. In addition, he requested the names of the firms that had received the false report in order to assure them that the company was solvent. Petitioner promised to look into the matter but refused to divulge the names of those who had received the report.

After determining that its report was indeed false, petitioner issued a corrective notice on or about August 3, 1976,

to the five subscribers who had received the initial report. The notice stated that one of respondent's former employees, not respondent itself, had filed for bankruptcy and that respondent "continued in business as usual." Respondent told petitioner that it was dissatisfied with the notice, and it again asked for a list of subscribers who had seen the initial report. Again petitioner refused to divulge their names.

Respondent then brought this defamation action in Vermont state court. It alleged that the false report had injured its reputation and sought both compensatory and punitive damages. The trial established that the error in petitioner's report had been caused when one of its employees, a 17-year-old high school student paid to review Vermont bankruptcy pleadings, had inadvertently attributed to respondent a bankruptcy petition filed by one of respondent's former employees. Although petitioner's representative testified that it was routine practice to check the accuracy of such reports with the businesses themselves, it did not try to verify the information about respondent before reporting it.

After trial, the jury returned a verdict in favor of respondent and awarded $50,000 in compensatory or presumed damages and $300,000 in punitive damages. Petitioner moved for a new trial. It argued that in *Gertz* v. *Robert Welch, Inc.*, *supra*, at 349, this Court had ruled broadly that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," and it argued that the judge's instructions in this case permitted the jury to award such damages on a lesser showing. The trial court indicated some doubt as to whether *Gertz* applied to "non-media cases," but granted a new trial "[b]ecause of . . . dissatisfaction with its charge and . . . conviction that the interests of justice require[d]" it. App. 26.

The Vermont Supreme Court reversed. 143 Vt. 66, 461 A. 2d 414 (1983). Although recognizing that "in certain instances the distinction between media and nonmedia defend-

ants may be difficult to draw," the court stated that "no such difficulty is presented with credit reporting agencies, which are in the business of selling financial information to a limited number of subscribers who have paid substantial fees for their services." *Id.*, at 73, 461 A. 2d, at 417. Relying on this distinguishing characteristic of credit reporting firms, the court concluded that such firms are not "the type of media worthy of First Amendment protection as contemplated by *New York Times* [*Co.* v. *Sullivan*, 376 U. S. 254 (1964),] and its progeny." *Id.*, at 73–74, 461 A. 2d, at 417–418. It held that the balance between a private plaintiff's right to recover presumed and punitive damages without a showing of special fault and the First Amendment rights of "nonmedia" speakers "must be struck in favor of the private plaintiff defamed by a nonmedia defendant." *Id.*, at 75, 461 A. 2d, at 418. Accordingly, the court held "that as a matter of federal constitutional law, the media protections outlined in *Gertz* are inapplicable to nonmedia defamation actions." *Ibid.*

Recognizing disagreement among the lower courts about when the protections of *Gertz* apply,[1] we granted certiorari. 464 U. S. 959 (1983). We now affirm, although for reasons different from those relied upon by the Vermont Supreme Court.

II

As an initial matter, respondent contends that we need not determine whether *Gertz* applies in this case because the instructions, taken as a whole, required the jury to find "actual

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[1] Compare *Denny* v. *Mertz*, 106 Wis. 2d 636, 318 N. W. 2d 141, cert. denied, 459 U. S. 883 (1982) (*Gertz* inapplicable to private figure suits against nonmedia defendants); *Stuempges* v. *Parke, Davis & Co.*, 297 N. W. 2d 252 (Minn. 1980) (same); *Rowe* v. *Metz*, 195 Colo. 424, 579 P. 2d 83 (1978) (same); and *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Ore. 361, 568 P. 2d 1359 (1977) (same), with *Antwerp Diamond Exchange, Inc.* v. *Better Business Bureau*, 130 Ariz. 523, 637 P. 2d 733 (1981) (*Gertz* applicable in such situations); and *Jacron Sales Co.* v. *Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976) (same).

malice" before awarding presumed or punitive damages.[2] The trial court instructed the jury that because the report was libelous *per se*, respondent was not required "to prove actual damages . . . since damage and loss [are] conclusively presumed." App. 17; accord, *id.*, at 19. It also instructed the jury that it could award punitive damages only if it found "actual malice." *Id.*, at 20. Its only other relevant instruction was that liability could not be established unless respondent showed "malice or lack of good faith on the part of the Defendant." *Id.*, at 18. Respondent contends that these references to "malice," "lack of good faith," and "actual malice" required the jury to find knowledge of falsity or reckless disregard for the truth—the "actual malice" of *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964)—before it awarded presumed or punitive damages.

We reject this claim because the trial court failed to define any of these terms adequately. It did not, for example, provide the jury with any definition of the term "actual malice." In fact, the only relevant term it defined was simple "malice."[3] And its definitions of this term included not only the *New York Times* formulation but also other concepts such as

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[2] Respondent also argues that petitioner did not seek the protections outlined in *Gertz* before the jury instructions were given and that the issue therefore was not preserved for review. Since the Vermont Supreme Court considered the federal constitutional issue properly presented and decided it, there is no bar to our review. See *Orr* v. *Orr*, 440 U. S. 268, 274–275 (1979).

[3] The full instruction on malice reads as follows:

"If you find that the Defendant acted in a bad faith towards the Plaintiff in publishing the Erroneous Report, *or* that Defendant intended to injure the Plaintiff in its business, *or* that it acted in a willful, wanton or reckless disregard of the rights and interests of the Plaintiff, the Defendant has acted maliciously and the privilege is destroyed. *Further*, if the Report was made with reckless disregard of the possible consequences, *or* if it was made with the knowledge that it was false *or* with reckless disregard of its truth or falsity, it was made with malice." App. 18–19 (emphasis added).

"bad faith" and "reckless disregard of the [statement's] possible consequences." App. 19. The instructions thus permitted the jury to award presumed and punitive damages on a lesser showing than "actual malice." Consequently, the trial court's conclusion that the instructions did not satisfy *Gertz* was correct, and the Vermont Supreme Court's determination that *Gertz* was inapplicable was necessary to its decision that the trial court erred in granting the motion for a new trial. We therefore must consider whether *Gertz* applies to the case before us.

III

In *New York Times Co.* v. *Sullivan*, *supra*, the Court for the first time held that the First Amendment limits the reach of state defamation laws. That case concerned a public official's recovery of damages for the publication of an advertisement criticizing police conduct in a civil rights demonstration. As the Court noted, the advertisement concerned "one of the major public issues of our time." *Id.*, at 271. Noting that "freedom of expression *upon public questions* is secured by the First Amendment," *id.*, at 269 (emphasis added), and that "debate *on public issues* should be uninhibited, robust, and wide-open," *id.*, at 270 (emphasis added), the Court held that a public official cannot recover damages for defamatory falsehood unless he proves that the false statement was made with "'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not," *id.*, at 280. In later cases, all involving public issues, the Court extended this same constitutional protection to libels of public figures, *e. g.*, *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and in one case suggested in a plurality opinion that this constitutional rule should extend to libels of any individual so long as the defamatory statements involved a "matter of public or general interest," *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.).

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), we held that the protections of *New York Times* did not extend as far as *Rosenbloom* suggested. *Gertz* concerned a libelous article appearing in a magazine called American Opinion, the monthly outlet of the John Birch Society. The article in question discussed whether the prosecution of a policeman in Chicago was part of a Communist campaign to discredit local law enforcement agencies. The plaintiff, Gertz, neither a public official nor a public figure, was a lawyer tangentially involved in the prosecution. The magazine alleged that he was the chief architect of the "frame-up" of the police officer and linked him to Communist activity. Like every other case in which this Court has found constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern.

In *Gertz*, we held that the fact that expression concerned a public issue did not by itself entitle the libel defendant to the constitutional protections of *New York Times*. These protections, we found, were not "justified solely by reference to the interest of the press and broadcast media in immunity from liability." 418 U. S., at 343. Rather, they represented "an accommodation between [First Amendment] concern[s] and the limited state interest present in the context of libel actions brought by public persons." *Ibid.* In libel actions brought by private persons we found the competing interests different. Largely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements, *id.*, at 345, we found that the State possessed a "strong and legitimate . . . interest in compensating private individuals for injury to reputation." *Id.*, at 348–349. Balancing this stronger state interest against the same First Amendment interest at stake in *New York Times*, we held that a State could not allow recovery of presumed and punitive damages absent a showing of "actual malice." Nothing in our opinion,

however, indicated that this same balance would be struck regardless of the type of speech involved.[4]

IV

We have never considered whether the *Gertz* balance obtains when the defamatory statements involve no issue of public concern. To make this determination, we must employ the approach approved in *Gertz* and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This state interest is identical to the one weighed in *Gertz*. There we found that it was "strong and legitimate." 418 U. S., at 348. A State should not lightly be required to abandon it,

> "for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name

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[4] The dissent states that "[a]t several points the Court in *Gertz* makes perfectly clear [that] the restrictions of presumed and punitive damages were to apply in all cases." *Post*, at 785, n. 11. Given the context of *Gertz*, however, the Court could have made "perfectly clear" only that these restrictions applied in cases involving *public speech*. In fact, the dissent itself concedes that "*Gertz* . . . focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages . . . ." *Post*, at 777 (original emphasis).

The dissent also incorrectly states that *Gertz* "specifically held," *post*, at 779, 793, both "that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons . . . ," *post*, at 779, and that "unrestrained presumed and punitive damages were 'unnecessarily' broad . . . in relation to the legitimate state interests," *post*, at 793–794. Although the Court made both statements, it did so only within the context of public speech. Neither statement controls here. What was "not . . . narrowly tailored" or was "'unnecessarily' broad" with respect to public speech is not necessarily so with respect to the speech now at issue. Properly understood, *Gertz* is consistent with the result we reach today.

> 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. . . .' *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (concurring opinion)." *Id.*, at 341.

The First Amendment interest, on the other hand, is less important than the one weighed in *Gertz*. We have long recognized that not all speech is of equal First Amendment importance.[5] It is speech on "'matters of public concern'"

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[5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. Obscene speech and "fighting words" long have been accorded no protection. *Roth* v. *United States*, 354 U. S. 476, 483 (1957); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942); cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591–592 (1952) (advocating violent overthrow of the Government is unprotected speech); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 716 (1931) (publication of troopship sailings during wartime may be enjoined). In the area of protected speech, the most prominent example of reduced protection for certain kinds of speech concerns commercial speech. Such speech, we have noted, occupies a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 456 (1978). It also is more easily verifiable and less likely to be deterred by proper regulation. *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976). Accordingly, it may be regulated in ways that might be impermissible in the realm of noncommercial expression. *Ohralik*, *supra*, at 456; *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 562–563 (1980).

Other areas of the law provide further examples. In *Ohralik* we noted that there are "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." 436 U. S., at 456 (citations omitted). Yet similar regulation of political speech is subject to the most rigorous scrutiny. See *Brown* v. *Hartlage*, 456 U. S. 45, 52–53 (1982); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 279, n. 19

that is "at the heart of the First Amendment's protection." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 776 (1978), citing *Thornhill* v. *Alabama*, 310 U. S. 88, 101 (1940). As we stated in *Connick* v. *Myers*, 461 U. S. 138, 145 (1983), this "special concern [for speech on public issues] is no mystery":

> "The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' *Roth* v. *United States*, 354 U. S. 476, 484 (1957); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 269 (1964). '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the '"highest rung of the hierarchy of First Amendment values,"' and is entitled to special protection. *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 913 (1982); *Carey* v. *Brown*, 447 U. S. 455, 467 (1980)."

In contrast, speech on matters of purely private concern is of less First Amendment concern. *Id.*, at 146–147. As a number of state courts, including the court below, have recognized, the role of the Constitution in regulating state libel law is far more limited when the concerns that activated *New York Times* and *Gertz* are absent.[6] In such a case,

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(1964); *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976). Likewise, while the power of the State to license lawyers, psychiatrists, and public school teachers—all of whom speak for a living—is unquestioned, this Court has held that a law requiring licensing of union organizers is unconstitutional under the First Amendment. *Thomas* v. *Collins*, 323 U. S. 516 (1945); see also *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 44 (1971) (opinion of BRENNAN, J.) ("the determinant whether the First Amendment applies to state libel actions is whether the utterance involved concerns an issue of public or general concern").

[6] As one commentator has remarked with respect to "the case of a commercial supplier of credit information that defames a person applying for

> "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press. The facts of the present case are wholly without the First Amendment concerns with which the Supreme Court of the United States has been struggling." *Harley-Davidson Motorsports, Inc.* v. *Markley*, 279 Ore. 361, 366, 568 P. 2d 1359, 1363 (1977).

Accord, *Rowe* v. *Metz*, 195 Colo. 424, 426, 579 P. 2d 83, 84 (1978); *Denny* v. *Mertz*, 106 Wis. 2d 636, 661, 318 N. W. 2d 141, 153, cert. denied, 459 U. S. 883 (1982).

While such speech is not totally unprotected by the First Amendment, see *Connick* v. *Myers*, *supra*, at 147, its protections are less stringent. In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not "substantial" in view of their effect on speech at the core of First Amendment concern. 418 U. S., at 349. This interest, however, *is* "substantial" relative to the incidental effect these remedies may have on speech of significantly less constitutional interest. The rationale of the common-law rules has been the experience and judgment of history that "proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication, it is all but certain that serious harm has resulted in fact." W. Prosser, Law of Torts § 112, p. 765 (4th ed. 1971); accord, *Rowe* v. *Metz*, *supra*, at 425–426, 579 P. 2d, at 84; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956). As a result, courts for centuries have allowed juries to presume that some damage occurred from many defamatory utter-

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credit"—the case before us today—"If the first amendment requirements outlined in *Gertz* apply, there is something clearly wrong with the first amendment or with *Gertz*." Shiffrin, The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment, 78 Nw. U. L. Rev. 1212, 1268 (1983).

ances and publications. Restatement of Torts § 568, Comment *b*, p. 162 (1938) (noting that Hale announced that damages were to be presumed for libel as early as 1670). This rule furthers the state interest in providing remedies for defamation by ensuring that those remedies are effective. In light of the reduced constitutional value of speech involving no matters of public concern, we hold that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of "actual malice."[7]

V

The only remaining issue is whether petitioner's credit report involved a matter of public concern. In a related context, we have held that "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Connick* v. *Myers*, *supra*, at 147–148.

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[7] The dissent, purporting to apply the same balancing test that we do today, concludes that even speech on purely private matters is entitled to the protections of *Gertz*. *Post*, at 786. Its "balance," however, rests on a misinterpretation. In particular, the dissent finds language in *Gertz* that, it believes, shows the State's interest to be "irrelevant." See *post*, at 794. It is then an easy step for the dissent to say that the State's interest is outweighed by even the reduced First Amendment interest in private speech. *Gertz*, however, did not say that the state interest was "irrelevant" in absolute terms. Indeed, such a statement is belied by *Gertz* itself, for it held that presumed and punitive damages were available under some circumstances. 418 U. S., at 349. Rather, what the *Gertz* language indicates is that the State's interest is not substantial relative to the First Amendment interest in *public speech*. This language is thus irrelevant to today's decision.

The dissent's "balance," moreover, would lead to the protection of all libels—no matter how attenuated their constitutional interest. If the dissent were the law, a woman of impeccable character who was branded a "whore" by a jealous neighbor would have no effective recourse unless she could prove "actual malice" by clear and convincing evidence. This is not malice in the ordinary sense, but in the more demanding sense of *New York Times*. The dissent would, in effect, constitutionalize the entire common law of libel.

These factors indicate that petitioner's credit report concerns no public issue.[8] It was speech solely in the individual interest of the speaker and its specific business audience. Cf. *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 561 (1980). This particular interest warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation. Cf. *id.*, at 566; *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 771–772 (1976). Moreover, since the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any "strong interest in the free flow of commercial information." *Id.*, at 764. There is simply no credible argument that this type of credit reporting requires special protection to ensure that "debate on public issues [will] be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U. S., at 270.

In addition, the speech here, like advertising, is hardy and unlikely to be deterred by incidental state regulation. See *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S., at 771–772. It is solely motivated by the desire for profit, which, we have noted, is a force less likely to be deterred than others. *Ibid.* Arguably, the reporting here was also more objectively verifiable than speech deserving of greater protection. See *ibid.* In any case, the market provides a powerful incentive to a credit reporting

[8] The dissent suggests that our holding today leaves all credit reporting subject to reduced First Amendment protection. This is incorrect. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also do not hold, as the dissent suggests we do, *post*, at 787, that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech. We discuss such speech, along with advertising, only to show how many of the same concerns that argue in favor of reduced constitutional protection in those areas apply here as well.

agency to be accurate, since false credit reporting is of no use to creditors. Thus, any incremental "chilling" effect of libel suits would be of decreased significance.[9]

VI

We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of "actual malice" does not violate the First Amendment when the defamatory statements do not involve matters of public concern. Accordingly, we affirm the judgment of the Vermont Supreme Court.

It is so ordered.

CHIEF JUSTICE BURGER, concurring in the judgment.

In *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), contrary to well-established common law prevailing in the states, a divided Court held that a private plaintiff in a defamation action cannot recover for a published falsehood unless he proves that the defendant was at least negligent in publishing the falsehood. The Court further held that there can be no "presumed" damages in such an action and that the private plaintiff cannot receive "punitive" damages unless it is established that the publication was made with "actual malice," as defined in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964).

I dissented in *Gertz* because I believed that, insofar as the "ordinary private citizen" was concerned, 418 U. S., at 355, the Court's opinion "abandon[ed] the traditional thread," *id.*, at 354–355, that had been the theme of the law in this country

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[9] The Court of Appeals for the Fifth Circuit has noted that, while most States provide a qualified privilege against libel suits for commercial credit reporting agencies, in those States that do not there is a thriving credit reporting business and commercial credit transactions are not inhibited. *Hood* v. *Dun & Bradstreet, Inc.*, 486 F. 2d 25, 32 (1973), cert. denied, 415 U. S. 985 (1974). The court cited an empirical study comparing credit transactions in Boise, Idaho, where there is no privilege, with those in Spokane, Washington, where there is one. 486 F. 2d, at 32, and n. 18.

up to that time. I preferred "to allow this area of law to continue to evolve as it [had] up to [then] with respect to private citizens rather than embark on a new doctrinal theory which [had] no jurisprudential ancestry." *Ibid.* *Gertz*, however, is now the law of the land, and until it is overruled, it must, under the principle of *stare decisis*, be applied by this Court.

The single question before the Court today is whether *Gertz* applies to this case. The plurality opinion holds that *Gertz* does not apply because, unlike the challenged expression in *Gertz*, the alleged defamatory expression in this case does not relate to a matter of public concern. I agree that *Gertz* is limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance, and that the expression in question here relates to a matter of essentially private concern. I therefore agree with the plurality opinion to the extent that it holds that *Gertz* is inapplicable in this case for the two reasons indicated. No more is needed to dispose of the present case.

I continue to believe, however, that *Gertz* was ill-conceived, and therefore agree with JUSTICE WHITE that *Gertz* should be overruled. I also agree generally with JUSTICE WHITE's observations concerning *New York Times Co.* v. *Sullivan*. *New York Times*, however, equates "reckless disregard of the truth" with malice; this should permit a jury instruction that malice may be found if the defendant is shown to have published defamatory material which, in the exercise of reasonable care, would have been revealed as untrue. But since the Court has not applied the literal language of *New York Times* in this way, I agree with JUSTICE WHITE that it should be reexamined. The great rights guaranteed by the First Amendment carry with them certain responsibilities as well.

Consideration of these issues inevitably recalls an aphorism of journalism that "too much checking on the facts has ruined many a good news story."

JUSTICE WHITE, concurring in the judgment.

Until *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), the law of defamation was almost exclusively the business of state courts and legislatures. Under the then prevailing state libel law, the defamed individual had only to prove a false written publication that subjected him to hatred, contempt, or ridicule. Truth was a defense; but given a defamatory false circulation, general injury to reputation was presumed; special damages, such as pecuniary loss and emotional distress, could be recovered; and punitive damages were available if common-law malice were shown. General damages for injury to reputation were presumed and awarded because the judgment of history was that "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed." Restatement of Torts § 621, Comment *a*, p. 314 (1938). The defendant was permitted to show that there was no reputational injury; but at the very least, the prevailing rule was that at least nominal damages were to be awarded for any defamatory publication actionable *per se*. This rule performed

> "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to expose the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom" *Id.* § 569, Comment *b*, p. 166.

Similar rules applied to slanderous statements that were actionable *per se*.[1]

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[1] At the common law, slander, unlike libel, was actionable *per se* only when it dealt with a narrow range of statements: those imputing a criminal offense, a venereal or loathsome and communicable disease, improper conduct of a lawful business, or unchastity of a woman. Restatement of Torts

New York Times Co. v. *Sullivan* was the first major step in what proved to be a seemingly irreversible process of constitutionalizing the entire law of libel and slander. Under the rule announced in that case, a public official suing for libel could no longer make out his case by proving a false and damaging publication. He could not establish liability and recover any damages, whether presumed or actually proved, unless he proved "malice," which was defined as a knowing falsehood or a reckless disregard for the truth. 376 U. S., at 280. Given that proof, however, the usual damages were available, including presumed and punitive damages. This judgment overturning 200 years of libel law was deemed necessary to implement the First Amendment interest in "uninhibited, robust, and wide-open" debate on public issues. *Id.*, at 270. Three years later, the same rule was applied to plaintiffs who were not public officials, but who were termed public figures. *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

In 1971, four Justices took the view that the *New York Times* rules should apply wherever a publication concerned any manner of general or public interest, even though the plaintiff was a private person. *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29. That view did not command a majority. But in *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), the Court again dealt with defamation actions by private individuals, for the first time holding that such plaintiffs could no longer recover by proving a false statement, no matter how damaging it might be to reputation. They must, in addition, prove some "fault," at least negligence. *Id.*, at 347, 350. Even with that proof, damages were not presumed but had to be proved. *Id.*, at 349. Furthermore, no punitive damages were available without proof of *New York Times* malice.

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§ 570 (1938). To be actionable, all other slanderous statements required additional proof of special damages other than an injury to reputation or emotional distress. The special damages most often took the form of material or pecuniary loss. *Id.* § 575 and Comment *b*, pp. 185–187.

418 U. S., at 350. This decision, which again purported to implement First Amendment values, seemingly left no defamation actions free from federal constitutional limitations.

I joined the judgment and opinion in *New York Times*. I also joined later decisions extending the *New York Times* standard to other situations. But I came to have increasing doubts about the soundness of the Court's approach and about some of the assumptions underlying it. I could not join the plurality opinion in *Rosenbloom*, and I dissented in *Gertz*, asserting that the common-law remedies should be retained for private plaintiffs. I remain convinced that *Gertz* was erroneously decided. I have also become convinced that the Court struck an improvident balance in the *New York Times* case between the public's interest in being fully informed about public officials and public affairs and the competing interest of those who have been defamed in vindicating their reputation.

In a country like ours, where the people purport to be able to govern themselves through their elected representatives, adequate information about their government is of transcendent importance. That flow of intelligence deserves full First Amendment protection. Criticism and assessment of the performance of public officials and of government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and women and hence lessen the confidence in government. As the Court said in *Gertz:* "[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." 418 U. S., at 340. Yet in *New York Times* cases, the public official's complaint will be dismissed unless he alleges and makes out a jury case of a knowing or reckless falsehood. Absent such proof, there will be no

jury verdict or judgment of any kind in his favor, even if the challenged publication is admittedly false. The lie will stand, and the public continue to be misinformed about public matters. This will recurringly happen because the putative plaintiff's burden is so exceedingly difficult to satisfy and can be discharged only by expensive litigation. Even if the plaintiff sues, he frequently loses on summary judgment or never gets to the jury because of insufficient proof of malice. If he wins before the jury, verdicts are often overturned by appellate courts for failure to prove malice. Furthermore, when the plaintiff loses, the jury will likely return a general verdict and there will be no judgment that the publication was false, even though it was without foundation in reality.[2] The public is left to conclude that the challenged statement was true after all. Their only chance of being accurately informed is measured by the public official's ability himself to counter the lie, unaided by the courts. That is a decidedly weak reed to depend on for the vindication of First Amend-

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[2] If the plaintiff succeeds in proving a jury case of malice, it may be that the jury will be asked to bring in separate verdicts on falsity and malice. In that event, there could be a verdict in favor of the plaintiff on falsity, but against him on malice. There would be no judgment in his favor, but the verdict on falsity would be a public one and would tend to set the record right and clear the plaintiff's name.

It might be suggested that courts, as organs of the government, cannot be trusted to discern what the truth is. But the logical consequence of that view is that the First Amendment forbids all libel and slander suits, for in each such suit, there will be no recovery unless the court finds the publication at issue to be factually false. Of course, no forum is perfect, but that is not a justification for leaving whole classes of defamed individuals without redress or a realistic opportunity to clear their names. We entrust to juries and the courts the responsibility of decisions affecting the life and liberty of persons. It is perverse indeed to say that these bodies are incompetent to inquire into the truth of a statement of fact in a defamation case. I can therefore discern nothing in the Constitution which forbids a plaintiff to obtain a judicial decree that a statement is false—a decree he can then use in the community to clear his name and to prevent further damage from a defamation already published.

ment interests—"it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story." *Rosenbloom*, 403 U. S., at 46–47 (opinion of BRENNAN, J.); *Gertz*, *supra*, at 363–364 (BRENNAN, J., dissenting).

Also, by leaving the lie uncorrected, the *New York Times* rule plainly leaves the public official without a remedy for the damage to his reputation. Yet the Court has observed that the individual's right to the protection of his own good name is a basic consideration of our constitutional system, reflecting "'our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz*, *supra*, at 341, quoting *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring). The upshot is that the public official must suffer the injury, often cannot get a judgment identifying the lie for what it is, and has very little, if any, chance of countering that lie in the public press.

The *New York Times* rule thus countenances two evils: first, the stream of information about public officials and public affairs is polluted and often remains polluted by false information; and second, the reputation and professional life of the defeated plaintiff may be destroyed by falsehoods that might have been avoided with a reasonable effort to investigate the facts. In terms of the First Amendment and reputational interests at stake, these seem grossly perverse results.

Of course, the Court in *New York Times* could not have been unaware of these realities. Despite our ringing endorsement of "wide-open" and "uninhibited" debate, which taken literally would protect falsehoods of all kinds, we cannot fairly be accused of giving constitutional protection to false information as such, for we went on to find competing and overriding constitutional justification for our decision. The constitutional interest in the flow of information about

public affairs was thought to be very strong, and discovering the truth in this area very difficult, even with the best of efforts. These considerations weighed so heavily that those who write and speak about public affairs were thought to require some breathing room—that is, they should be permitted to err and misinform the public as long as they act unknowingly and without recklessness. If the press could be faced with possibly sizable damages for every mistaken publication injurious to reputation, the result would be an unacceptable degree of self-censorship, which might prevent the occasional mistaken libel, but would also often prevent the timely flow of information that is thought to be true but cannot be readily verified. The press must therefore be privileged to spread false information, even though that information has negative First Amendment value and is severely damaging to reputation, in order to encourage the full flow of the truth, which otherwise might be withheld.

Gertz is subject to similar observations. Although rejecting the *New York Times* malice standard where the plaintiff is neither a public official nor a public figure, there the Court nevertheless deprived the private plaintiff of his common-law remedies, making recovery more difficult in order to provide a margin for error. In doing so, the Court ruled that without proof of at least negligence, a plaintiff damaged by the most outrageous falsehoods would be remediless, and the lie very likely would go uncorrected. And even if fault were proved, actual damage to reputation would have to be shown, a burden traditional libel law considered difficult, if not impossible, to discharge. For this reason JUSTICE POWELL would not impose on the plaintiff the burden of proving damages in the case now before us.

Although there was much talk in *Gertz* about liability without fault and the unfairness of presuming damages, all of this, as was the case in *New York Times*, was done in the name of the First Amendment, purportedly to shield the press and others writing about public affairs from possibly intimidating

damages liability. But if protecting the press from intimidating damages liability that might lead to excessive timidity was the driving force behind *New York Times* and *Gertz*, it is evident that the Court engaged in severe overkill in both cases.

In *New York Times*, instead of escalating the plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal by limiting the recoverable damages to a level that would not unduly threaten the press. Punitive damages might have been scrutinized as Justice Harlan suggested in *Rosenbloom*, *supra*, at 77, or perhaps even entirely forbidden. Presumed damages to reputation might have been prohibited, or limited, as in *Gertz*. Had that course been taken and the common-law standard of liability been retained, the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered. He might have also recovered a modest amount, enough perhaps to pay his litigation expenses. At the very least, the public official should not have been required to satisfy the actual malice standard where he sought no damages but only to clear his name. In this way, both First Amendment and reputational interests would have been far better served.

We are not talking in these cases about mere criticism or opinion, but about misstatements of fact that seriously harm the reputation of another, by lowering him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement of Torts § 559 (1938). The necessary breathing room for speakers can be ensured by limitations on recoverable damages; it does not also require depriving many public figures of any room to vindicate their reputations sullied by false statements of fact. It could be suggested that even without the threat of large presumed and punitive damages awards, press defendants' communica-

tion will be unduly chilled by having to pay for the actual damages caused to those they defame. But other commercial enterprises in this country not in the business of disseminating information must pay for the damage they cause as a cost of doing business, and it is difficult to argue that the United States did not have a free and vigorous press before the rule in *New York Times* was announced. In any event, the *New York Times* standard was formulated to protect the press from the chilling danger of numerous large damages awards. Nothing in the central rationale behind *New York Times* demands an absolute immunity from suits to establish the falsity of a defamatory misstatement about a public figure where the plaintiff cannot make out a jury case of actual malice.

I still believe the common-law rules should have been retained where the plaintiff is not a public official or public figure. As I see it, the Court undervalued the reputational interest at stake in such cases. I have also come to doubt the easy assumption that the common-law rules would muzzle the press. But even accepting the *Gertz* premise that the press also needed protection in suits by private parties, there was no need to modify the common-law requirements for establishing liability and to increase the burden of proof that must be satisfied to secure a judgment authorizing at least nominal damages and the recovery of additional sums within the limitations that the Court might have set.[3]

It is interesting that JUSTICE POWELL declines to follow the *Gertz* approach in this case. I had thought that the decision in *Gertz* was intended to reach cases that involve any false statements of fact injurious to reputation, whether the statement is made privately or publicly and whether or not it implicates a matter of public importance. JUSTICE POWELL, however, distinguishes *Gertz* as a case that involved a matter

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[3] The Court was unresponsive to my suggestion in dissent, 418 U. S., at 391–392, that the plaintiff should be able to prove and obtain a judgment of falsehood without having to establish any kind of fault.

of public concern, an element absent here. Wisely, in my view, JUSTICE POWELL does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants. On that issue, I agree with JUSTICE BRENNAN that the First Amendment gives no more protection to the press in defamation suits than it does to others exercising their freedom of speech. None of our cases affords such a distinction; to the contrary, the Court has rejected it at every turn.[4] It should be rejected again, particularly in this context, since it makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation. If *Gertz* is to be distinguished from this case, on the ground that it applies only where the allegedly false publication deals with a matter of general or public importance, then where the false publication does not deal with such a matter, the common-law rules would apply whether the defendant is a member of the media or other public disseminator or a nonmedia individual publishing privately. Although JUSTICE POWELL speaks only of the inapplicability of the *Gertz* rule with respect to presumed and

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[4] We explained in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972) that "the informative function asserted by representatives of the organized press" to justify greater privileges under the First Amendment was also "performed by lecturers, political pollsters, novelists, academic researchers, and dramatists." *Id.*, at 705. From its inception, without discussing the issue, we have applied the rule of *New York Times* to nonmedia defendants. See *New York Times*, 376 U. S., at 254, n., 286; *Henry* v. *Collins*, 380 U. S. 356 (1965); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964). And this Court has made plain that the organized press has a monopoly neither on the First Amendment nor on the ability to enlighten. *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 782 (1978). See also *Pell* v. *Procunier*, 417 U. S. 817 (1974) (press has no independent First Amendment right of access to prisons). Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 48–49 (1976) (the idea that government can restrict the speech of some elements of society to enhance the relative voice of others is "wholly foreign" to the First Amendment).

punitive damages, it must be that the *Gertz* requirement of some kind of fault on the part of the defendant is also inapplicable in cases such as this.

As I have said, I dissented in *Gertz*, and I doubt that the decision in that case has made any measurable contribution to First Amendment or reputational values since its announcement. Nor am I sure that it has saved the press a great deal of money. Like the *New York Times* decision, the burden that plaintiffs must meet invites long and complicated discovery involving detailed investigation of the workings of the press, how a news story is developed, and the state of mind of the reporter and publisher. See *Herbert* v. *Lando*, 441 U. S. 153 (1979). That kind of litigation is very expensive. I suspect that the press would be no worse off financially if the common-law rules were to apply and if the judiciary was careful to insist that damages awards be kept within bounds. A legislative solution to the damages problem would also be appropriate. Moreover, since libel plaintiffs are very likely more interested in clearing their names than in damages, I doubt that limiting recoveries would deter or be unfair to them. In any event, I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true.

The question before us is whether *Gertz* is to be applied in this case. For either of two reasons, I believe that it should not. First, I am unreconciled to the *Gertz* holding and believe that it should be overruled. Second, as JUSTICE POWELL indicates, the defamatory publication in this case does not deal with a matter of public importance. Consequently, I concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

This case involves a difficult question of the proper application of *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974), to credit reporting—a type of speech at some remove from that

which first gave rise to explicit First Amendment restrictions on state defamation law—and has produced a diversity of considered opinions, none of which speaks for the Court. JUSTICE POWELL's plurality opinion affirming the judgment below would not apply the *Gertz* limitations on presumed and punitive damages to this case; rather, the three Justices joining that opinion would hold that the First Amendment requirement of actual malice—a clear and convincing showing of knowing falsehood or reckless disregard for the truth—should have no application in this defamation action because the speech involved a subject of purely private concern and was circulated to an extremely limited audience. Establishing this exception, the opinion reaffirms *Gertz* for cases involving matters of public concern, *ante*, at 756–757, and reaffirms *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), for cases in which the challenged speech allegedly libels a public official or a public figure. *Ante*, at 755. JUSTICE WHITE also would affirm; he would not apply *Gertz* to this case on the ground that the subject matter of the publication does not deal with a matter of general or public importance. *Ante*, at 774 (concurring in judgment).[1] THE CHIEF JUSTICE apparently agrees with JUSTICE WHITE. *Ante*, at 764 (concurring in judgment). The four who join this opinion would reverse the judgment of the Vermont Supreme Court. We believe that, although protection of the type of expression at issue is admittedly not the "central meaning of the First Amendment," 376 U. S., at 273, *Gertz* makes clear that the First Amendment nonetheless requires restraints on presumed and punitive damages awards for this

[1] JUSTICE WHITE also ventures some modest proposals for restructuring the First Amendment protections currently afforded defendants in defamation actions. JUSTICE WHITE agrees with *New York Times Co.* v. *Sullivan*, however, that the breathing space needed to ensure the robust debate of public issues essential to our democratic society is impermissibly threatened by unrestrained damages awards for defamatory remarks. *Ante*, at 770–772 (opinion concurring in judgment).

expression. The lack of consensus in approach to these idiosyncratic facts should not, however, obscure the solid allegiance the principles of *New York Times Co.* v. *Sullivan* continue to command in the jurisprudence of this Court. See also *Bose Corp.* v. *Consumer's Union of the United States, Inc.*, 466 U. S. 485 (1984).

I

In *New York Times Co.* v. *Sullivan* the Court held that the First Amendment shields all who speak in good faith from the threat of unrestrained libel judgments for unintentionally false criticism of a public official. Recognizing that libel law, like all other governmental regulation of the content of speech, "can claim no talismanic immunity from constitutional limitations [and] must be measured by standards that satisfy the First Amendment," 376 U. S., at 269, the Court drew from salutary common-law developments, *id.*, at 280, and n. 20,[2] and unquestioned First Amendment principles, *id.*, at 273–274, to formulate the now-familiar actual malice test. Because the "erroneous statement is inevitable in free debate . . . [it] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'" *New York Times Co.* v. *Sullivan*, *supra*, at

[2] The principles were expressed as early as 1788 in an opinion of the Pennsylvania Supreme Court:

"What then is the meaning of *the bill of rights*, and *Constitution* of *Pennsylvania*, when they declare, 'That the freedom of the press shall not be restrained,' and 'that the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any part of the government?' . . . [T]hey give to every citizen a right of investigating the conduct of those who are entrusted with the public business . . . . The true liberty of the press is amply secured by permitting every man to publish his opinions; but it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame. To the latter description, it is impossible that any good government should afford protection and impunity." *Respublica* v. *Oswald*, 1 Dall. 319, 325 (footnotes omitted).

271–272, quoting *NAACP* v. *Button*, 371 U. S. 415, 433 (1963); see *Bose Corp.*, *supra*, at 513. These solidly accepted principles are not at issue today.

Our First Amendment libel decisions in the last two decades have in large measure been an effort to explore the full ramifications of the *New York Times Co.* v. *Sullivan* principles. Building on the extension of actual malice to "public figure" plaintiffs in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), the Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), and *Gertz* v. *Robert Welch, Inc.*, *supra*, focused largely on defining the circumstances under which protection of the central First Amendment value of robust debate of *public issues* should mandate plaintiffs to show actual malice to obtain a judgment and actual damages; the Court settled on a rule requiring actual malice as a prerequisite to recovery only in suits brought by public officials or public figures. 418 U. S., at 344–346.[3] We have also recognized, however, that the First Amendment requires significant protection from defamation law's chill for a range of expression far broader than simply speech about pure political issues. See *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967) ("The guarantees for free speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government"); cf. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 231 (1977).

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[3] A plurality in *Rosenbloom* would have applied the actual malice standard of liability when the alleged libel concerned matters of "public or general interest," irrespective of the status of the plaintiff. 403 U. S., at 43 (opinion of BRENNAN, J.). In *Gertz* the Court rejected the *Rosenbloom* plurality's "public or general interest" approach. That approach was thought unacceptably to impair the reputational interests of private individuals, who, unlike public officials or public figures, neither assume the risk of rough treatment by entering the public arena nor have ready access to the media to rebut false charges. 418 U. S., at 344–345. It was also thought to "occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest.'" *Id.*, at 346 (citation omitted).

Our cases since *New York Times Co.* v. *Sullivan* have proceeded from the general premise that all libel law implicates First Amendment values to the extent it deters true speech that would otherwise be protected by the First Amendment. 376 U. S., at 269. In this sense defamation law does not differ from state efforts to control obscenity, see *Miller* v. *California*, 413 U. S. 15, 23–24 (1973), ensure loyalty, see *Speiser* v. *Randall*, 357 U. S. 513 (1958), protect consumers, see *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), oversee professions, see *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985), or pursue other public welfare goals through content-based regulation of speech. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Speiser* v. *Randall*, *supra*, at 520. This general proscription against unnecessarily broad content-based regulation permeates First Amendment jurisprudence.

In libel law, no less than any other governmental effort to regulate speech, States must therefore use finer instruments to ensure adequate space for protected expression. Cf. *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557, 565 (1980) (restriction "may extend only so far as the interest it serves"); *Lowe* v. *SEC*, *ante*, at 234 (WHITE, J., concurring in judgment) ("[T]he First Amendment permits restraints on speech only when they are narrowly tailored to advance a legitimate governmental interest"). The ready availability and unconstrained application of presumed and punitive damages in libel actions is too blunt a regulatory instrument to satisfy this First Amendment principle, even when the alleged libel does not implicate directly the type of speech at issue in *New York Times Co.* v.

Sullivan. Justice Harlan made precisely this point in *Rosenbloom:*

> "At a minimum, *even in the purely private libel area,* I think the First Amendment should be construed to limit the imposition of punitive damages to those situations where actual malice is proved. This is the typical standard employed in assessing anyone's liability for punitive damages where the underlying aim of the law is to compensate for harm actually caused, . . . and no conceivable state interest could justify imposing a harsher standard on the exercise of *those freedoms that are given explicit protection by the First Amendment.*" 403 U. S., at 73 (dissenting opinion) (emphasis added).

See also *id.*, at 65; *New York Times Co.* v. *Sullivan,* 376 U. S., at 269.

Justice Harlan's perception formed the cornerstone of the Court's analysis in *Gertz.* Requiring "that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved," the Court found it "necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury." 418 U. S., at 349. The Court explained that state rules authorizing presumed and punitive damages conferred on juries "largely uncontrolled discretion" to assess damages "in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Id.*, at 349–350. Punitive damages in particular were found to be "*wholly irrelevant* to the state interest" because "[t]hey are not compensation for injury." *Id.*, at 350 (emphasis added). For these reasons, the Court in *Gertz* specifically held that the award of presumed and punitive damages on less than a showing of actual malice is not a narrowly tailored means to achieve the legitimate state purpose of protecting the reputation of private persons: the common-law approach, said the Court, "*unnecessarily* compounds the

potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." *Id.*, at 349 (emphasis added).[4]

Thus, when an alleged libel involves criticism of a public official or a public figure, the need to nurture robust debate of public issues and the requirement that all state regulation of speech be narrowly tailored coalesce to require actual malice as a prerequisite to any recovery. When the alleged libel involves speech that falls outside these especially important categories, we have held that the Constitution permits States significant leeway to compensate for actual damage to reputation.[5] The requirement of narrowly tailored

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[4] Since the decision in *Gertz*, we have applied its reasoning with respect to damages in excess of compensation for actual harm in other areas of the law. See, *e. g.*, *Electrical Workers* v. *Foust*, 442 U. S. 42, 48–52 (1979); *Newport* v. *Fact Concerts, Inc.*, 453 U. S. 247, 270–271 (1981). These cases, like *Gertz*, recognize that "the alleged deterrence achieved by punitive damages awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined." *Smith* v. *Wade*, 461 U. S. 30, 59 (1983) (REHNQUIST, J., dissenting). See *id.*, at 46–47 (Court opinion) (noting prevailing view that punitive damages may only be awarded for "'conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others,'" quoting Restatement (Second) of Torts § 908(2) (1979) (emphasis deleted)); 461 U. S., at 93–94 (O'CONNOR, J., dissenting); *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 244–245 (1984); *id.*, at 260–261 (BLACKMUN, J., dissenting); *id.*, at 276 (POWELL, J., dissenting).

[5] Such speech might at times involve issues of public or general interest within the meaning of *Rosenbloom* and thus implicate important First Amendment interests. To justify this cost, the Court in *Gertz* held that the State had an enhanced interest in protecting private reputation and cited the independent First Amendment difficulties inherent in case-by-case judicial determination of whether speech concerns a matter of public interest. 418 U. S., at 344–346. See n. 3, *supra*. The decision in *Gertz* is also susceptible of an alternative justification. Speech allegedly defaming a private person will generally be far less likely to implicate matters of public importance than will speech allegedly defaming public officials or public figures. In light of the problems inherent in case-by-case judicial

regulatory measures, however, always mandates at least a showing of fault and proscribes the award of presumed and punitive damages on less than a showing of actual malice. It has remained the judgment of the Court since *Gertz* that this comprehensive two-tiered structure best accommodates the values of the constitutional free speech guarantee and the States' interest in protecting reputation.

II

The question presented here is narrow. Neither the parties nor the courts below have suggested that respondent Greenmoss Builders should be required to show actual malice to obtain a judgment and actual compensatory damages. Nor do the parties question the requirement of *Gertz* that respondent must show fault to obtain a judgment and actual damages. The only question presented is whether a jury award of presumed and punitive damages based on less than a showing of actual malice is constitutionally permissible. *Gertz* provides a forthright negative answer. To preserve the jury verdict in this case, therefore, the opinions of JUSTICE POWELL and JUSTICE WHITE have cut away the protective mantle of *Gertz*.

A

Relying on the analysis of the Vermont Supreme Court, respondent urged that this pruning be accomplished by restricting the applicability of *Gertz* to cases in which the defendant is a "media" entity. Such a distinction is irreconcilable with the fundamental First Amendment principle that "[t]he inherent worth of . . . speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston* v. *Bellotti*, 435

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determination of what is in the public interest, the Court's result could be explained as a decision that the cost of case-by-case evaluation could be avoided without significant chilling of speech involving matters of public importance.

U. S. 765, 777 (1978). First Amendment difficulties lurk in the definitional questions such an approach would generate.[6] And the distinction would likely be born an anachronism.[7]

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[6] An attempt to characterize petitioner Dun & Bradstreet illustrates the point. Like an account of judicial proceedings in a newspaper, magazine, or news broadcast, a statement in petitioner's reports that a particular company has filed for bankruptcy is a report of a timely news event conveyed to members of the public by a business organized to collect and disseminate such information. Thus it is not obvious why petitioner should find less protection in the First Amendment than do established print or electronic media. The Vermont Supreme Court nonetheless characterized petitioner as a nonmedia defendant entitled to less protection because it is "in the business of selling financial information to a limited number of subscribers who have paid substantial fees for [its] services." 143 Vt. 66, 73, 461 A. 2d 414, 417 (1983). The court added that "[t]here is a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience." *Ibid.*

No clear line consistent with First Amendment principles can be drawn on the basis of these criteria. That petitioner's information is "specialized" or that its subscribers pay "substantial fees" hardly distinguishes these reports from articles in many publications that would surely fall on the "media" side of the line the Vermont Supreme Court seeks to draw. Few published statements are of universal interest, and few publications are distributed without charge. Much fare of any metropolitan daily is specialized information for which a selective, finite audience pays a fee. Nor is there any reason to treat petitioner differently than a more widely circulated publication because it has "a limited number of subscribers." Indeed, it would be paradoxical to increase protection to statements injurious to reputation as the size of their audience, and hence their potential to injure, grows. Cf. *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770, 781 (1984).

[7] Owing to transformations in the technological and economic structure of the communications industry, there has been an increasing convergence of what might be labeled "media" and "nonmedia." Pool, The New Technologies: Promise of Abundant Channels at Lower Cost, in What's News: The Media in American Society 81, 87 (1981). See also I. Pool, Technologies of Freedom (1983); U. S. Federal Trade Commission, Media Policy Session: Technology and Legal Change (1979); Subcommittee on Telecommunications, Consumer Protection, and Finance of the House Committee on Energy and Commerce, Telecommunications in Transition: The Status

Perhaps most importantly, the argument that *Gertz* should be limited to the media misapprehends our cases. We protect the press to ensure the vitality of First Amendment guarantees.[8] This solicitude implies no endorsement of the principle that speakers other than the press deserve lesser First Amendment protection. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating . . . the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, *supra*, at 784–785. See *Bridges* v. *California*, 314 U. S. 252, 277–278 (1941).

The free speech guarantee gives each citizen an equal right to self-expression and to participation in self-government. See, *e. g.*, *Carey* v. *Brown*, 447 U. S. 455, 459–463 (1980); *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972); *Cohen* v. *California*, 403 U. S. 15, 24 (1971); *Whitney* v. *California*, 274 U. S. 357, 375–377 (1927) (Brandeis, J., concurring). This guarantee also protects the rights of listeners to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945).[9] Accordingly, at least six

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of Competition in the Telecommunications Industry, 97th Cong., 1st Sess. (Comm. Print 1981).

[8] See, *e. g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 585 (1983); *Columbia Broadcasting System, Inc.* v. *FCC*, 453 U. S. 367, 395 (1981); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974); *Branzburg* v. *Hayes*, 408 U. S. 665, 707 (1972); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Mills* v. *Alabama*, 384 U. S. 214, 218–219 (1966); *Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233, 250 (1936). See also *Herbert* v. *Lando*, 441 U. S. 153, 180–199 (1979) (BRENNAN, J., dissenting in part); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843, 850 (1974) (POWELL, J., dissenting); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 393 (1973) (BURGER, C. J., dissenting); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967); Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975).

[9] In light of the "increasingly prominent role of mass media in our society, and the awesome power it has placed in the hands of a select few," *Gertz*, 418 U. S., at 402 (WHITE, J., dissenting), protection for the speech

Members of this Court (the four who join this opinion and JUSTICE WHITE and THE CHIEF JUSTICE) agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities. See *ante*, at 773 (opinion concurring in judgment).[10]

B

Eschewing the media/nonmedia distinction, the opinions of both JUSTICE WHITE and JUSTICE POWELL focus primarily on the content of the credit report as a reason for restricting the applicability of *Gertz*. Arguing that at most *Gertz* should protect speech that "deals with a matter of public or general importance," *ante*, at 773, JUSTICE WHITE, without analysis or explanation, decides that the credit report at issue here falls outside this protected category. The plurality opinion of JUSTICE POWELL offers virtually the same conclusion with at least a garnish of substantive analysis.

Purporting to "employ the approach approved in *Gertz*," *ante*, at 757, JUSTICE POWELL balances the state interest in protecting private reputation against the First Amendment interest in protecting expression on matters not of public concern. The state interest is found to be identical to that at stake in *Gertz*. The First Amendment interest is, however, found to be significantly weaker because speech on public issues, such as that involved in *Gertz*, receives greater constitutional protection than speech that is not a matter of public concern. See *ante*, at 759–760, citing *Connick* v. *Myers*,

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of nonmedia defendants is essential to ensure a diversity of perspectives. See J. Barron, Freedom of the Press for Whom? (1973). "[U]ninhibited, robust and wide-open" debate, *New York Times Co.* v. *Sullivan*, 376 U. S., at 270, among nonmedia speakers is as essential to the fostering and development of an individual's political thought as is such debate in the mass media. See J. Klapper, The Effects of Mass Communications (1960).

[10] JUSTICE POWELL's opinion does not expressly reject the media/nonmedia distinction, but does expressly decline to apply that distinction to resolve this case.

461 U. S. 138 (1983). JUSTICE POWELL is willing to concede that such speech receives some First Amendment protection, but on balance finds that such protection does not reach so far as to restrain the state interest in protecting reputation through presumed and punitive damages awards in state defamation actions. *Ante*, at 760–761. Without explaining what *is* a "matter of public concern," the plurality opinion proceeds to serve up a smorgasbord of reasons why the speech at issue here is not, *ante*, at 761–762, and on this basis affirms the Vermont courts' award of presumed and punitive damages.

In professing allegiance to *Gertz*, the plurality opinion protests too much. As JUSTICE WHITE correctly observes, JUSTICE POWELL departs completely from the analytic framework and result of that case: "*Gertz* was intended to reach cases that involve any false statements . . . whether or not [they] implicat[e] a matter of public importance." *Ante*, at 772 (concurring in judgment).[11] Even accepting the notion that a distinction can and should be drawn between matters

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[11] One searches *Gertz* in vain for a single word to support the proposition that limits on presumed and punitive damages obtained only when speech involved matters of public concern. *Gertz* could not have been grounded in such a premise. Distrust of placing in the courts the power to decide what speech was of public concern was precisely the rationale *Gertz* offered for rejecting the *Rosenbloom* plurality approach. 418 U. S., at 346. It would have been incongruous for the Court to go on to circumscribe the protection against presumed and punitive damages by reference to a judicial judgment as to whether the speech at issue involved matters of public concern. At several points the Court in *Gertz* makes perfectly clear the restrictions of presumed and punitive damages were to apply in all cases. *Id.*, at 346, 349–350.

Indeed, JUSTICE POWELL's opinion today is fairly read as embracing the approach of the *Rosenbloom* plurality to deciding when the Constitution should limit state defamation law. The limits imposed, however, are less stringent than those suggest by the *Rosenbloom* plurality. Under the approach of today's plurality, speech about matters of public or general interest receives only the *Gertz* protections against unrestrained presumed and punitive damages, not the full *New York Times Co.* v. *Sullivan* protections against any recovery absent a showing of actual malice.

of public concern and matters of purely private concern, however, the analyses presented by both JUSTICE POWELL and JUSTICE WHITE fail on their own terms. Both, by virtue of what they hold in this case, propose an impoverished definition of "matters of public concern" that is irreconcilable with First Amendment principles. The credit reporting at issue here surely involves a subject matter of sufficient public concern to require the comprehensive protections of *Gertz*. Were this speech appropriately characterized as a matter of only private concern, moreover, the elimination of the *Gertz* restrictions on presumed and punitive damages would still violate basic First Amendment requirements.

(1)

The five Members of the Court voting to affirm the damages award in this case have provided almost no guidance as to what constitutes a protected "matter of public concern." JUSTICE WHITE offers nothing at all, but his opinion does indicate that the distinction turns on solely the subject matter of the expression and not on the extent or conditions of dissemination of that expression. *Ante*, at 773. JUSTICE POWELL adumbrates a rationale that would appear to focus primarily on subject matter.[12] The opinion relies on the fact that the speech at issue was "solely in the individual interest of the speaker and its specific *business* audience," *ante*, at 762 (emphasis added). Analogizing explicitly to advertising,

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[12] JUSTICE POWELL also appears to rely in part on the fact that communication was limited and confidential. *Ante*, at 762. Given that his analysis also relies on the subject matter of the credit report, *ante*, at 761–762, it is difficult to decipher exactly what role the nature and extent of dissemination plays in JUSTICE POWELL's analysis. But because the subject matter of the expression at issue is properly understood as a matter of public concern, see *infra*, at 791–793, it may well be that this element of confidentiality is crucial to the outcome as far as JUSTICE POWELL's opinion is concerned. In other words, it may be that JUSTICE POWELL thinks this particular expression could not contribute to public welfare because the public generally does not receive it. This factor does not suffice to save the analysis. See n. 18, *infra*.

the opinion also states that credit reporting is "hardy" and "solely motivated by the desire for profit." *Ibid.* These two strains of analysis suggest that JUSTICE POWELL is excluding the subject matter of credit reports from "matters of public concern" because the speech is predominantly in the realm of matters of economic concern.

In evaluating the subject matter of expression, this Court has consistently rejected the argument that speech is entitled to diminished First Amendment protection simply because it concerns economic matters or is in the economic interest of the speaker or the audience. See, *e. g.*, *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501–502 (1952); *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325–326 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 101–103 (1940); see also *Abood* v. *Detroit Board of Education*, 431 U. S., at 231–232, and n. 28. "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Id.*, at 231. The breadth of this protection evinces recognition that freedom of expression is not only essential to check tyranny and foster self-government but also intrinsic to individual liberty and dignity and instrumental in society's search for truth. See *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U. S., at 503–504; *Whitney* v. *California*, 274 U. S., at 375 (Brandeis, J., concurring).

Speech about commercial or economic matters, even if not directly implicating "the central meaning of the First Amendment," 376 U. S., at 273, is an important part of our public discourse. The Court made clear in the context of discussing labor relations speech in *Thornhill* v. *Alabama*, *supra:*

> "It is recognized now that satisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have an importance which is not less than the interests of those in the business or industry directly concerned. The health of the

> present generation and of those as yet unborn may depend on these matters, and the practices in a single factory may have economic repercussions upon a whole region and affect widespread systems of marketing. The merest glance at state and federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." 310 U. S., at 102–103.

As *Thornhill* suggests, the choices we make when we step into the voting booth may well be the products of what we have learned from the myriad of daily economic and social phenomenon that surround us. See *id.*, at 102 ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period").[13]

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[13] Similarly, we have rejected the arguments for denying or restricting First Amendment protection of advertising on the ground that advertising is not a matter of public concern. Recognizing that even pure advertising may well be affected with a public interest, we have stated that "the free flow of commercial information is indispensable . . . to the formation of intelligent opinions as to how [our economic] system ought to be regulated or altered." *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 765 (1976). See also *Bigelow* v. *Virginia*, 421 U. S. 809, 822 (1975) ("Viewed in its entirety the [abortion] advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered"). The potential political aspect of attempts to influence consumer preferences has also been recognized. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 538–539 (1981) (BRENNAN, J., concurring in judgment) ("May the city decide that a United Automobile Workers billboard with the message 'Be a patriot—do not buy Japanese-manufactured cars' is 'commercial' and therefore forbid it?"). The greater state latitude for regulating commercial

The credit reporting of Dun & Bradstreet falls within any reasonable definition of "public concern" consistent with our precedents. JUSTICE POWELL's reliance on the fact that Dun & Bradstreet publishes credit reports "for profit," *ante*, at 762, is wholly unwarranted. Time and again we have made clear that speech loses none of its constitutional protection "even though it is carried in a form that is 'sold' for profit." *Virginia Pharmacy Bd.*, 425 U. S., at 761. See also *Smith* v. *California*, 361 U. S. 147, 150 (1959); *Joseph Burstyn, Inc.* v. *Wilson*, *supra*, at 501. More importantly, an announcement of the bankruptcy of a local company is information of potentially great concern to residents of the community where the company is located; like the labor dispute at issue in *Thornhill*, such a bankruptcy "in a single factory may have economic repercussions upon a whole region." And knowledge about solvency and the effect and prevalence of bankruptcy certainly would inform citizen opinions about questions of economic regulation. It is difficult to suggest that a bankruptcy is not a subject matter of public concern when federal law requires invocation of judicial mechanisms to effectuate it and makes the fact of the bankruptcy a matter of public record. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

Given that the subject matter of credit reporting directly implicates matters of public concern, the balancing analysis the Court today employs should properly lead to the conclusion that the type of expression here at issue should receive First Amendment protection from the chilling potential of unrestrained presumed and punitive damages in defamation actions.[14]

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advertising is instead a function of "greater objectivity and hardiness." *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, at 772, n. 24.

[14] JUSTICE POWELL purports to draw from *Connick* v. *Myers*, 461 U. S. 138 (1983), a test for distinguishing matters of public concern from matters of private concern. This reliance perpetuates a definition of "public con-

(2)

Even if the subject matter of credit reporting were properly considered—in the terms of JUSTICE WHITE and JUSTICE POWELL—as purely a matter of private discourse, this speech would fall well within the range of valuable expression for which the First Amendment demands protection. Much expression that does not directly involve public issues receives significant protection. Our cases do permit some diminution in the degree of protection afforded one category of speech about economic or commercial matters. "Commercial speech"—defined as advertisements that "[do] no more than propose a commercial transaction," *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 385 (1973)—may be more closely regulated than other types of speech. Even commercial speech, however, receives substantial First Amendment protection. *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, *supra*, at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. . . . To this end, the free flow of commercial information is indispensable"). Credit reporting is not "commercial speech" as this Court has defined the term. Even if credit reporting were so considered, it would still be entitled to the substantial protections the First Amendment affords that category. See *Zauderer*, 471 U. S., at 637; *id.*, at 657–658 (BRENNAN, J., concurring in part and dissenting in part). Under either view, the expression at issue in this case should receive protection from the chilling potential of unrestrained presumed and punitive damages awards in defamation actions.

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cern" wholly out of accord with our consistent precedents and with the common-law understanding of the concept. See *id.*, at 165, n. 5 (BRENNAN, J., dissenting). Moreover, *Connick* explicitly limited its distinction between public and private concern to the "context" of a government employment situation. *Id.*, at 148, and n. 8.

Our economic system is predicated on the assumption that human welfare will be improved through informed decisionmaking. In this respect, ensuring broad distribution of accurate financial information comports with the fundamental First Amendment premise that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U. S., at 20. The economic information Dun & Bradstreet disseminates in its credit reports makes an undoubted contribution to this private discourse essential to our well-being. Justice Douglas made precisely this point:

> "The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources. . . .
>
> "The financial data circulated by Dun & Bradstreet, Inc., are part of the fabric of national commercial communication." *Dun & Bradstreet, Inc.* v. *Grove*, 404 U. S. 898, 905–906 (1971) (Douglas, J., dissenting from denial of certiorari).

Justice Douglas further noted that "[p]resumably the credit reports published by the petitioner facilitate through the price system the improvement of human welfare at least as much as did the underlying disagreement in our most recent libel opinion, *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), arising out of a squabble over whether a vendor had sold obscene magazines." *Id.*, at 905, n. 9.

The credit reports of Dun & Bradstreet bear few of the earmarks of commercial speech that might be entitled to somewhat less rigorous protection. In *every* case in which we have permitted more extensive state regulation on the basis of a commercial speech rationale the speech being regu-

lated was pure advertising—an offer to buy or sell goods and services or encouraging such buying and selling.[15] Credit reports are not commercial advertisements for a good or service or a proposal to buy or sell such a product. We have been extremely chary about extending the "commercial speech" doctrine beyond this narrowly circumscribed category of advertising because often vitally important speech will be uttered to advance economic interests and because the profit motive making such speech hardy dissipates rapidly when the speech is not advertising. Compare *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980), with *Consolidated Edison Co.* v. *Public Service Comm'n of New York*, 447 U. S. 530 (1980).

It is worth noting in this regard that the common law of most States, although apparently not of Vermont, 143 Vt. 66, 76, 461 A. 2d 414, 419 (1983), recognizes a qualified privilege for reports like that at issue here. See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 99–105 (1983). The privilege typically precludes recovery for false and defamatory credit information without a showing of bad faith or malice, a standard of proof which is often defined according to the *New York Times* formulation. See, *e. g.*, *Datacon, Inc.* v. *Dun & Bradstreet, Inc.*, 465 F. Supp. 706, 708 (ND Tex. 1979). The common law thus recognizes that credit reporting is quite susceptible to libel's chill; this accumulated learning is worthy of respect.

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[15] See, *e. g.*, *Zauderer* v. *Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U. S. 626 (1985); *Bolger* v. *Young Products Corp.*, 463 U. S. 60 (1983) (contraceptive advertising); *In re R. M. J.*, 455 U. S. 191 (1982) (lawyer advertising); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490 (1981) (commercial billboard advertising); *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557 (1980) (advertising of electricity); *Friedman* v. *Rogers*, 440 U. S. 1 (1979) (optometrist advertising); *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978) (lawyer's solicitation of business); *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer advertising).

Even if JUSTICE POWELL's characterization of the credit reporting at issue here were accepted in its entirety, his opinion would have done no more than demonstrate that this speech is the equivalent of commercial speech. The opinion, after all, relies on analogy to advertising. Credit reporting is said to be hardy, motivated by desire for profit, and relatively verifiable. *Ante*, at 762. But this does not justify the elimination of restrictions on presumed and punitive damages. State efforts to regulate commercial speech in the form of advertising must abide by the requirement that the regulatory means chosen be narrowly tailored so as to avoid any unnecessary chilling of protected expression. See *Zauderer, supra; Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc., supra; Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York, supra.*[16]

The Court in *Gertz* specifically held that unrestrained presumed and punitive damages were "unnecessarily" broad,

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[16] Indeed JUSTICE POWELL has chosen a particularly inapt set of facts as a basis for urging a return to the common law. Though the individual's interest in reputation is certainly at the core of notions of human dignity, *ante*, at 757–758, citing *Rosenblatt* v. *Baer*, 383 U. S. 75, 92 (1966) (Stewart, J., concurring); see *Paul* v. *Davis*, 424 U. S. 693, 714 (1976) (BRENNAN, J., dissenting), the reputational interest at stake here is that of a corporation. Similarly, that this speech is solely commercial in nature undercuts the argument that presumed damages should be unrestrained in actions like this one because actual harm will be difficult to prove. If the credit report is viewed as commercial expression, proving that actual damages occurred is relatively easy. For instance, an alleged libel concerning a bank's customer may cause the bank to lower the credit limit or raise the interest rate charged that customer. The commercial context does not increase the need for presumed damages, but if anything reduces the need to presume harm. At worst the commercial damages caused by such action should be no more difficult to ascertain than many other traditional elements of tort damages. See, *e. g.*, *Russell* v. *City of Wildwood*, 428 F. 2d 1176, 1181 (CA3 1970) (future earnings); *Seffert* v. *Los Angeles Transit Lines*, 56 Cal. 2d 498, 509, 364 P. 2d 337, 344 (1961) (Traynor, J., dissenting) (pain and suffering).

418 U. S., at 350, in relation to the legitimate state interests. Indeed, *Gertz* held that in a defamation action punitive damages, designed to chill and not to compensate, were "*wholly irrelevant*" to furtherance of any valid state interest. *Ibid.* The Court did not reach these conclusions by weighing the strength of the state interest against the strength of the First Amendment interest. Rather, the Court recognized and applied the principle that regulatory measures that chill protected speech be no broader than necessary to serve the legitimate state interest asserted. The plurality opinion today recognizes, as it must, that the state interest at issue here is identical to that at issue in *Gertz*. What was "irrelevant" in *Gertz* must still be irrelevant, and the requirement that the regulatory means be no broader than necessary is no less applicable even if the speech is simply the equivalent of commercial speech. Thus, unrestrained presumed and punitive damages for this type of speech must run afoul of First Amendment guarantees.[17]

(3)

Even if not at "the essence of self-government," *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75 (1964), the expression at issue in this case is important to both our public discourse and our private welfare. That its motivation might be the economic interest of the speaker or listeners does not diminish its First Amendment value. See *Consolidated Edison Co.*

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[17] JUSTICE POWELL's analysis fails to apply the requirement that regulation be narrowly tailored. At one point the opinion reads: "This particular interest [in credit reporting] warrants no special protection when . . . the speech is wholly false and clearly damaging to the victim's business reputation." *Ante*, at 762. The point, of course, is not that false speech intrinsically deserves protection, see *Gertz*, 418 U. S., at 340, but that the burdening of unintentional false speech potentially chills truthful speech. Thus, the state interest in compensating injury resulting from false speech must be vindicated by means that are narrowly tailored to avoid this deleterious result.

v. *Public Service Comm'n of New York*, 447 U. S. 530 (1980). Whether or not such speech is sufficiently central to First Amendment values to require actual malice as a standard of liability, this speech certainly falls within the range of speech that *Gertz* sought to protect from the chill of unrestrained presumed and punitive damages awards.[18]

Of course, the commercial context of Dun & Bradstreet's reports is relevant to the constitutional analysis insofar as it implicates the strong state interest "in protecting consumers and regulating commercial transactions," *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 460 (1978). Cf. *Bolger* v. *Young Drug Products Corp.*, 463 U. S. 60, 81 (1983) (STEVENS, J., concurring in judgment). The special harms caused by inaccurate credit reports, the lack of public sophistication about or access to such reports, and the fact that such reports by and large contain statements that are fairly readily susceptible of verification, all may justify appropriate

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[18] JUSTICE POWELL also relies in part on the fact that the expression had a limited circulation and was expressly kept confidential by those who received it. Because the subject matter of the expression at issue in this case would clearly receive the comprehensive protections of *Gertz* were the speech publicly disseminated, this factor of confidential circulation to a limited number of subscribers is perhaps properly understood as the linchpin of JUSTICE POWELL's analysis. See *ante*, at 762 (because of confidentiality "it cannot be said that the report involves any 'strong interest in the free flow of commercial information'") (plurality opinion) (citation omitted). See also n. 12, *supra*.

This argument does not save the analysis. The assertion that the limited and confidential circulation might make the expression less a matter of public concern is dubious on its own terms and flatly inconsistent with our decision in *Givhan* v. *Western Line Consolidated School Dist.*, 439 U. S. 410 (1979). Perhaps more importantly, Dun & Bradstreet doubtless provides thousands of credit reports to thousands of subscribers who receive the information pursuant to the same strictures imposed on the recipients in this case. As a systemic matter, therefore, today's decision diminishes the free flow of information because Dun & Bradstreet will generally be made more reticent in providing information to all its subscribers.

regulation designed to prevent the social losses caused by false credit reports.[19] And in the libel context, the States' regulatory interest in protecting reputation is served by rules permitting recovery for actual compensatory damages upon a showing of fault. Any further interest in deterring potential defamation through case-by-case judicial imposition of presumed and punitive damages awards on less than a showing of actual malice simply exacts too high a toll on First Amendment values. Accordingly, Greenmoss Builders should be permitted to recover for any actual damage it can show resulted from Dun & Bradstreet's negligently false credit report, but should be required to show actual malice to receive presumed or punitive damages. Because the jury was not instructed in accordance with these principles, we would reverse and remand for further proceedings not inconsistent with this opinion.

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[19] See Maurer, Common Law Defamation and the Fair Credit Reporting Act, 72 Geo. L. J. 95, 126 (1983):

"Under *Gertz*, plaintiffs may be compensated for actual damages upon establishing the fault of the defendant; to obtain punitive damages, a plaintiff must demonstrate malice. Sections 1681o and 1681n [of the Fair Credit Reporting Act] are consistent with these constitutional principles. Section 1681o provides for recovery of actual damages upon a showing of negligence, which presumably satisfies the *Gertz* requirement of fault. Section 1681n authorizes punitive damages for willful violation of the Act. Whether section 1681n is equivalent to *Gertz*'s malice standard depends on whether a court would consider it to be possible to fail willfully to follow reasonable procedures and yet not manifest reckless disregard for the truth. Such a fine distinction appears unworkable as a categorical test, so that section 1681n would likely be regarded as harmonious with the principles of *Gertz*. Thus, the Act appears to provide the degree of protection for commercial speech currently required under first amendment doctrine" (footnotes omitted).

PHILLIPS PETROLEUM CO. *v.* SHUTTS ET AL.

CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 84–233. Argued February 25, 1985—Decided June 26, 1985

During the 1970's, petitioner produced or purchased natural gas from leased land located in 11 States. Respondents, royalty owners possessing rights to leases from which petitioner produced the gas, brought a class action against petitioner in a Kansas state court, seeking to recover interest on royalty payments that had been delayed by petitioner. The trial court certified a class consisting of 33,000 royalty owners. Respondents provided each class member with a notice by first-class mail describing the action and informing each member that he could appear in person or by counsel, that otherwise he would be represented by respondents, and that class members would be included in the class and bound by the judgment unless they "opted out" of the action by returning a "request for exclusion." The final class consisted of some 28,000 members, who reside in all 50 States, the District of Columbia, and several foreign countries. Notwithstanding that over 99% of the gas leases in question and some 97% of the plaintiff class members had no apparent connection to Kansas except for the lawsuit, the trial court applied Kansas contract and equity law to every claim and found petitioner liable for interest on the suspended royalties to all class members. The Kansas Supreme Court affirmed over petitioner's contentions that the Due Process Clause of the Fourteenth Amendment prevented Kansas from adjudicating the claims of all the class members, and that that Clause and the Full Faith and Credit Clause prohibited application of Kansas law to all of the transactions between petitioner and the class members.

Held:

1. Petitioner has standing to assert the claim that Kansas did not have jurisdiction over the class members who were not Kansas residents and had no connection to Kansas. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way petitioner can assure itself of this binding effect is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a res judicata defense in a later suit by class members. The alleged injury petitioner would incur if the class-action judgment against it became final without binding the plaintiff class is sufficient to give petitioner standing on its own right to raise the jurisdiction claim in this Court. Pp. 803–806.

2. The Kansas trial court properly asserted personal jurisdiction over the absent plaintiff class members and their claims against petitioner. The Due Process Clause requires notice, an opportunity to appear in person or by counsel, an opportunity to "opt out," and adequate representation. It does not require that absent class members affirmatively "opt in" to the class, rather than be deemed members of the class if they did not "opt out." The procedure followed by Kansas, where a fully descriptive notice is sent by first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process. The interests of the absent plaintiff class members are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the trial court. Pp. 806–814.

3. The Kansas Supreme Court erred in deciding that the application of Kansas law to all claims would be constitutional. Kansas must have a "significant contact or aggregation of contacts" to the claims asserted by each plaintiff class member in order to ensure that the choice of Kansas law was not arbitrary or unfair. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict between Kansas law and the law of other States, such as Texas, where some of the leased land in question is located, application of Kansas law to every claim in this case was sufficiently arbitrary and unfair as to exceed constitutional limits. Pp. 814–823.

235 Kan. 195, 679 P. 2d 1159, affirmed in part, reversed in part, and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined, and in Parts I and II of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 823. POWELL, J., took no part in the decision of the case.

Arthur R. Miller argued the cause for petitioner. With him on the briefs were *Joseph W. Kennedy*, *Robert W. Coykendall*, *Kenneth Heady*, *William G. Paul*, and *T. L. Cubbage II*.

Joel I. Klein argued the cause for respondents. With him on the brief were *W. Luke Chapin*, *Ed Moore*, and *Harold Greenleaf*.*

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*Briefs of *amici curiae* urging reversal were filed for the Legal Foundation of America by *David Crump*; and for Amoco Production Co. by *Lucas A. Powe, Jr.*, *R. H. Landt*, and *Glenn D. Young, Jr.*

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner is a Delaware corporation which has its principal place of business in Oklahoma. During the 1970's it produced or purchased natural gas from leased land located in 11 different States, and sold most of the gas in interstate commerce. Respondents are some 28,000 of the royalty owners possessing rights to the leases from which petitioner produced the gas; they reside in all 50 States, the District of Columbia, and several foreign countries. Respondents brought a class action against petitioner in the Kansas state court, seeking to recover interest on royalty payments which had been delayed by petitioner. They recovered judgment in the trial court, and the Supreme Court of Kansas affirmed the judgment over petitioner's contentions that the Due Process Clause of the Fourteenth Amendment prevented Kansas from adjudicating the claims of all the respondents, and that the Due Process Clause and the Full Faith and Credit Clause of Article IV of the Constitution prohibited the application of Kansas law to all of the transactions between petitioner and respondents. 235 Kan. 195, 679 P. 2d 1159 (1984). We granted certiorari to consider these claims. 469 U. S. 879 (1984). We reject petitioner's jurisdictional claim, but sustain its claim regarding the choice of law.

Because petitioner sold the gas to its customers in interstate commerce, it was required to secure approval for price increases from what was then the Federal Power Commission, and is now the Federal Energy Regulatory Commission. Under its regulations the Federal Power Commission permitted petitioner to propose and collect tentative higher gas prices, subject to final approval by the Commission. If the Commission eventually denied petitioner's proposed price increase or reduced the proposed increase, petitioner would

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Alan B. Morrison and *David C. Vladeck* filed a brief for the Public Citizen as *amicus curiae* urging affirmance.

David B. Kahn filed a brief for the Consumer Coalition as *amicus curiae.*

have to refund to its customers the difference between the approved price and the higher price charged, plus interest at a rate set by statute. See 18 CFR § 154.102 (1984).

Although petitioner received higher gas prices pending review by the Commission, petitioner suspended any increase in royalties paid to the royalty owners because the higher price could be subject to recoupment by petitioner's customers. Petitioner agreed to pay the higher royalty only if the royalty owners would provide petitioner with a bond or indemnity for the increase, plus interest, in case the price increase was not ultimately approved and a refund was due to the customers. Petitioner set the interest rate on the indemnity agreements at the same interest rate the Commission would have required petitioner to refund to its customers. A small percentage of the royalty owners provided this indemnity and received royalties immediately from the interim price increases; these royalty owners are unimportant to this case.

The remaining royalty owners received no royalty on the unapproved portion of the prices until the Federal Power Commission approval of those prices became final. Royalties on the unapproved portion of the gas price were suspended three times by petitioner, corresponding to its three proposed price increases in the mid-1970's. In three written opinions the Commission approved all of petitioner's tentative price increases, so petitioner paid to its royalty owners the suspended royalties of $3.7 million in 1976, $4.7 million in 1977, and $2.9 million in 1978. Petitioner paid no interest to the royalty owners although it had the use of the suspended royalty money for a number of years.

Respondents Irl Shutts, Robert Anderson, and Betty Anderson filed suit against petitioner in Kansas state court, seeking interest payments on their suspended royalties which petitioner had possessed pending the Commission's approval of the price increases. Shutts is a resident of Kansas, and the Andersons live in Oklahoma. Shutts and the Ander-

sons own gas leases in Oklahoma and Texas. Over petitioner's objection the Kansas trial court granted respondents' motion to certify the suit as a class action under Kansas law. Kan. Stat. Ann. § 60–223 *et seq.* (1983). The class as certified was comprised of 33,000 royalty owners who had royalties suspended by petitioner. The average claim of each royalty owner for interest on the suspended royalties was $100.

After the class was certified respondents provided each class member with notice through first-class mail. The notice described the action and informed each class member that he could appear in person or by counsel; otherwise each member would be represented by Shutts and the Andersons, the named plaintiffs. The notices also stated that class members would be included in the class and bound by the judgment unless they "opted out" of the lawsuit by executing and returning a "request for exclusion" that was included with the notice. The final class as certified contained 28,100 members; 3,400 had "opted out" of the class by returning the request for exclusion, and notice could not be delivered to another 1,500 members, who were also excluded. Less than 1,000 of the class members resided in Kansas. Only a minuscule amount, approximately one quarter of one percent, of the gas leases involved in the lawsuit were on Kansas land.

After petitioner's mandamus petition to decertify the class was denied, *Phillips Petroleum* v. *Duckworth*, No. 82–54608 (Kan., June 28, 1982), cert. denied, 459 U. S. 1103 (1983), the case was tried to the court. The court found petitioner liable under Kansas law for interest on the suspended royalties to all class members. The trial court relied heavily on an earlier, unrelated class action involving the same nominal plaintiff and the same defendant, *Shutts, Executor* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P. 2d 1292 (1977), cert. denied, 434 U. S. 1068 (1978). The Kansas Supreme Court had held in *Shutts, Executor* that a gas company owed interest to royalty owners for royalties suspended pending final Commission approval of a price increase. No federal statutes

touched on the liability for suspended royalties, and the court in *Shutts, Executor* held as a matter of Kansas equity law that the applicable interest rates for computation of interest on suspended royalties were the interest rates at which the gas company would have had to reimburse its customers had its interim price increase been rejected by the Commission. The court in *Shutts, Executor* viewed these as the fairest interest rates because they were also the rates that petitioner required the royalty owners to meet in their indemnity agreements in order to avoid suspended royalties.

The trial court in the present case applied the rule from *Shutts, Executor*, and held petitioner liable for prejudgment and postjudgment interest on the suspended royalties, computed at the Commission rates governing petitioner's three price increases. See 18 CFR § 154.102 (1984). The applicable interest rates were: 7% for royalties retained until October 1974; 9% for royalties retained between October 1974 and September 1979; and thereafter at the average prime rate. The trial court did not determine whether any difference existed between the laws of Kansas and other States, or whether another State's laws should be applied to non-Kansas plaintiffs or to royalties from leases in States other than Kansas. 235 Kan., at 221, 679 P. 2d, at 1180.

Petitioner raised two principal claims in its appeal to the Supreme Court of Kansas. It first asserted that the Kansas trial court did not possess personal jurisdiction over absent plaintiff class members as required by *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and similar cases. Related to this first claim was petitioner's contention that the "opt-out" notice to absent class members, which forced them to return the request for exclusion in order to avoid the suit, was insufficient to bind class members who were not residents of Kansas or who did not possess "minimum contacts" with Kansas. Second, petitioner claimed that Kansas courts could not apply Kansas law to every claim in the dispute. The trial court should have looked to the laws of each State

where the leases were located to determine, on the basis of conflict of laws principles, whether interest on the suspended royalties was recoverable, and at what rate.

The Supreme Court of Kansas held that the entire cause of action was maintainable under the Kansas class-action statute, and the court rejected both of petitioner's claims. 235 Kan. 195, 679 P. 2d 1159 (1984). First, it held that the absent class members were plaintiffs, not defendants, and thus the traditional minimum contacts test of *International Shoe* did not apply. The court held that nonresident class-action plaintiffs were only entitled to adequate notice, an opportunity to be heard, an opportunity to opt out of the case, and adequate representation by the named plaintiffs. If these procedural due process minima were met, according to the court, Kansas could assert jurisdiction over the plaintiff class and bind each class member with a judgment on his claim. The court surveyed the course of the litigation and concluded that all of these minima had been met.

The court also rejected petitioner's contention that Kansas law could not be applied to plaintiffs and royalty arrangements having no connection with Kansas. The court stated that generally the law of the forum controlled all claims unless "compelling reasons" existed to apply a different law. The court found no compelling reasons, and noted that "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." 235 Kan., at 222, 679 P. 2d, at 1181. The court affirmed as a matter of Kansas equity law the award of interest on the suspended royalties, at the rates imposed by the trial court. The court set the postjudgment interest rate on all claims at the Kansas statutory rate of 15%. *Id.*, at 224, 679 P. 2d, at 1183.

I

As a threshold matter we must determine whether petitioner has standing to assert the claim that Kansas did not possess proper jurisdiction over the many plaintiffs in the

class who were not Kansas residents and had no connection to Kansas. Respondents claim that a party generally may assert only his own rights, and that petitioner has no standing to assert the rights of its adversary, the plaintiff class, in order to defeat the judgment in favor of the class.

Standing to sue in any Article III court is, of course, a federal question which does not depend on the party's prior standing in state court. *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952); *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). Generally stated, federal standing requires an allegation of a present or immediate injury in fact, where the party requesting standing has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Ibid.* There must be some causal connection between the asserted injury and the challenged action, and the injury must be of the type "likely to be redressed by a favorable decision." *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U. S. 464, 472 (1982). See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U. S. 26, 41–42 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 261 (1977).

Additional prudential limitations on standing may exist even though the Article III requirements are met because "the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99–100 (1979). One of these prudential limits on standing is that a litigant must normally assert his own legal interests rather than those of third parties. See *Singleton* v. *Wulff*, 428 U. S. 106 (1976); *Craig* v. *Boren*, 429 U. S. 190 (1976).

Respondents claim that petitioner is barred by the rule requiring that a party assert only his own rights; they point out that respondents and petitioner are adversaries and do

not have allied interests such that petitioner would be a good proponent of class members' interests. They further urge that petitioner's interference is unneeded because the class members have had opportunity to complain about Kansas' assertion of jurisdiction over their claim, but none have done so. See *Singleton, supra,* at 113–114.

Respondents may be correct that petitioner does not possess standing *jus tertii,* but this is not the issue. Petitioner seeks to vindicate its own interests. As a class-action defendant petitioner is in a unique predicament. If Kansas does not possess jurisdiction over this plaintiff class, petitioner will be bound to 28,100 judgment holders scattered across the globe, but none of these will be bound by the Kansas decree. Petitioner could be subject to numerous later individual suits by these class members because a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party. Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class-action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

While it is true that a court adjudicating a dispute may not be able to predetermine the res judicata effect of its own judgment, petitioner has alleged that it would be obviously and immediately injured if this class-action judgment against it became final without binding the plaintiff class. We think that such an injury is sufficient to give petitioner standing on its own right to raise the jurisdiction claim in this Court.

Petitioner's posture is somewhat similar to the trust settlor defendant in *Hanson* v. *Denckla,* 357 U. S. 235 (1958), who we found to have standing to challenge the forum's personal

jurisdiction over an out-of-state trust company which was an indispensable party under the forum State's law. Because the court could not proceed with the action without jurisdiction over the trust company, we observed that "any defendant affected by the court's judgment ha[d] that 'direct and substantial personal interest in the outcome' that is necessary to challenge whether that jurisdiction was in fact acquired." *Id.*, at 245, quoting *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77 (1958).

II

Reduced to its essentials, petitioner's argument is that unless out-of-state plaintiffs affirmatively consent, the Kansas courts may not exert jurisdiction over their claims. Petitioner claims that failure to execute and return the "request for exclusion" provided with the class notice cannot constitute consent of the out-of-state plaintiffs; thus Kansas courts may exercise jurisdiction over these plaintiffs only if the plaintiffs possess the sufficient "minimum contacts" with Kansas as that term is used in cases involving personal jurisdiction over out-of-state defendants. *E. g.*, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945); *Shaffer* v. *Heitner*, 433 U. S. 186 (1977); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286 (1980). Since Kansas had no prelitigation contact with many of the plaintiffs and leases involved, petitioner claims that Kansas has exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs.

In *International Shoe* we were faced with an out-of-state corporation which sought to avoid the exercise of personal jurisdiction over it as a defendant by a Washington state court. We held that the extent of the defendant's due process protection would depend "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws . . . ." 326 U. S., at 319. We noted that the Due Process Clause did not permit a State to make a binding judgment against a person with whom the State had no con-

tacts, ties, or relations. *Ibid.* If the defendant possessed certain minimum contacts with the State, so that it was "reasonable and just, according to our traditional conception of fair play and substantial justice" for a State to exercise personal jurisdiction, the State could force the defendant to defend himself in the forum, upon pain of default, and could bind him to a judgment. *Id.*, at 320.

The purpose of this test, of course, is to protect a defendant from the travail of defending in a distant forum, unless the defendant's contacts with the forum make it just to force him to defend there. As we explained in *Woodson*, *supra*, the defendant's contacts should be such that "he should reasonably anticipate being haled" into the forum. 444 U. S., at 297. In *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702–703, and n. 10 (1982), we explained that the requirement that a court have personal jurisdiction comes from the Due Process Clause's protection of the defendant's personal liberty interest, and said that the requirement "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." (Footnote omitted.)

Although the cases like *Shaffer* and *Woodson* which petitioner relies on for a minimum contacts requirement all dealt with out-of-state defendants or parties in the procedural posture of a defendant, cf. *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518 (1916); *Estin* v. *Estin*, 334 U. S. 541 (1948), petitioner claims that the same analysis must apply to absent class-action plaintiffs. In this regard petitioner correctly points out that a chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). An adverse judgment by Kansas courts in this case may extinguish the chose in action forever through res judicata. Such an adverse judgment, petitioner claims, would be every bit as onerous to an absent plaintiff as an adverse judgment on the merits would be to a defend-

ant. Thus, the same due process protections should apply to absent plaintiffs: Kansas should not be able to exert jurisdiction over the plaintiffs' claims unless the plaintiffs have sufficient minimum contacts with Kansas.

We think petitioner's premise is in error. The burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant. An out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it. The defendant must generally hire counsel and travel to the forum to defend itself from the plaintiff's claim, or suffer a default judgment. The defendant may be forced to participate in extended and often costly discovery, and will be forced to respond in damages or to comply with some other form of remedy imposed by the court should it lose the suit. The defendant may also face liability for court costs and attorney's fees. These burdens are substantial, and the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant.

A class-action plaintiff, however, is in quite a different posture. The Court noted this difference in *Hansberry* v. *Lee*, 311 U. S. 32, 40–41 (1940), which explained that a "class" or "representative" suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense. *Ibid.*, citing *Pennoyer* v. *Neff*, 95 U. S. 714 (1878). As the Court pointed out in *Hansberry*, the class action was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the litigation was too great to permit joinder. The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.[1] 311 U. S., at 41.

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[1] The holding in *Hansberry*, of course, was that petitioners in that case had not a sufficient common interest with the parties to a prior lawsuit

Modern plaintiff class actions follow the same goals, permitting litigation of a suit involving common questions when there are too many plaintiffs for proper joinder. Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually. For example, this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available.

In sharp contrast to the predicament of a defendant haled into an out-of-state forum, the plaintiffs in this suit were not haled anywhere to defend themselves upon pain of a default judgment. As commentators have noted, from the plaintiffs' point of view a class action resembles a "quasi-administrative proceeding, conducted by the judge." 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶23.45 [4.–5] (1984); Kaplan, Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 398 (1967).

A plaintiff class in Kansas and numerous other jurisdictions cannot first be certified unless the judge, with the aid of the named plaintiffs and defendant, conducts an inquiry into the common nature of the named plaintiffs' and the absent plaintiffs' claims, the adequacy of representation, the jurisdiction possessed over the class, and any other matters that will bear upon proper representation of the absent plaintiffs' interest. See, *e. g.*, Kan. Stat. Ann. §60–223 (1983); Fed. Rule Civ. Proc. 23. Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. See Kan. Stat. Ann. §60–223(d) (1983). The court and named plaintiffs protect his interests. Indeed, the class-action defendant itself has a great interest in ensuring that the absent plaintiffs' claims are properly before the forum. In this case, for

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such that a decree against those parties in the prior suit would bind the petitioners. But in the present case there is no question that the named plaintiffs adequately represent the class, and that all members of the class have the same interest in enforcing their claims against the defendant.

example, the defendant sought to avoid class certification by alleging that the absent plaintiffs would not be adequately represented and were not amenable to jurisdiction. See *Phillips Petroleum* v. *Duckworth*, No. 82–54608 (Kan., June 28, 1982).

The concern of the typical class-action rules for the absent plaintiffs is manifested in other ways. Most jurisdictions, including Kansas, require that a class action, once certified, may not be dismissed or compromised without the approval of the court. In many jurisdictions such as Kansas the court may amend the pleadings to ensure that all sections of the class are represented adequately. Kan. Stat. Ann. § 60–223(d) (1983); see also, *e. g.*, Fed. Rule Civ. Proc. 23(d).

Besides this continuing solicitude for their rights, absent plaintiff class members are not subject to other burdens imposed upon defendants. They need not hire counsel or appear. They are almost never subject to counterclaims or cross-claims, or liability for fees or costs.[2] Absent plaintiff class members are not subject to coercive or punitive remedies. Nor will an adverse judgment typically bind an absent plaintiff for any damages, although a valid adverse judgment may extinguish any of the plaintiff's claims which were litigated.

Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class, and if he takes advantage of that opportunity he is removed from the

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[2] Petitioner places emphasis on the fact that absent class members might be subject to discovery, counterclaims, cross-claims, or court costs. Petitioner cites no cases involving any such imposition upon plaintiffs, however. We are convinced that such burdens are rarely imposed upon plaintiff class members, and that the disposition of these issues is best left to a case which presents them in a more concrete way.

litigation entirely. This was true of the Kansas proceedings in this case. The Kansas procedure provided for the mailing of a notice to each class member by first-class mail. The notice, as we have previously indicated, described the action and informed the class member that he could appear in person or by counsel, in default of which he would be represented by the named plaintiffs and their attorneys. The notice further stated that class members would be included in the class and bound by the judgment unless they "opted out" by executing and returning a "request for exclusion" that was included in the notice.

Petitioner contends, however, that the "opt out" procedure provided by Kansas is not good enough, and that an "opt in" procedure is required to satisfy the Due Process Clause of the Fourteenth Amendment. Insofar as plaintiffs who have no minimum contacts with the forum State are concerned, an "opt in" provision would require that each class member affirmatively consent to his inclusion within the class.

Because States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter. The Fourteenth Amendment does protect "persons," not "defendants," however, so absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims. In this case we hold that a forum State may exercise jurisdiction over the claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with the forum which would support personal jurisdiction over a defendant. If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law,[3] it must provide min-

[3] Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions,

imal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U. S., at 314–315; cf. *Eisen* v. *Carlisle & Jacquelin*, 417 U. S. 156, 174–175 (1974). The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. *Hansberry*, 311 U. S., at 42–43, 45.

We reject petitioner's contention that the Due Process Clause of the Fourteenth Amendment requires that absent plaintiffs affirmatively "opt in" to the class, rather than be deemed members of the class if they do not "opt out." We think that such a contention is supported by little, if any precedent, and that it ignores the differences between class-action plaintiffs, on the one hand, and defendants in nonclass civil suits on the other. Any plaintiff may consent to jurisdiction. *Keeton* v. *Hustler Magazine, Inc.*, 465 U. S. 770 (1984). The essential question, then, is how stringent the requirement for a showing of consent will be.

We think that the procedure followed by Kansas, where a fully descriptive notice is sent first-class mail to each class member, with an explanation of the right to "opt out," satisfies due process. Requiring a plaintiff to affirmatively

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such as those seeking equitable relief. Nor, of course, does our discussion of personal jurisdiction address class actions where the jurisdiction is asserted against a *defendant* class.

request inclusion would probably impede the prosecution of those class actions involving an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. See, *e. g.*, *Eisen*, *supra*, at 161. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually, nor would he affirmatively request inclusion in the class if such a request were required by the Constitution.[4] If, on the other hand, the plaintiff's claim is sufficiently large or important that he wishes to litigate it on his own, he will likely have retained an attorney or have thought about filing suit, and should be fully capable of exercising his right to "opt out."

In this case over 3,400 members of the potential class did "opt out," which belies the contention that "opt out" procedures result in guaranteed jurisdiction by inertia. Another 1,500 were excluded because the notice and "opt out" form was undeliverable. We think that such results show that the "opt out" procedure provided by Kansas is by no means *pro forma*, and that the Constitution does not require more to protect what must be the somewhat rare species of class member who is unwilling to execute an "opt out" form, but whose claim is nonetheless so important that he cannot be presumed to consent to being a member of the class by his failure to do so. Petitioner's "opt in" requirement would require the invalidation of scores of state statutes and of the class-action provision of the Federal Rules of Civil Proce-

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[4] In this regard the Reporter for the 1966 amendments to the Federal Rules of Civil Procedure stated:

"[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 397–398 (1967).

dure,[5] and for the reasons stated we do not think that the Constitution requires the State to sacrifice the obvious advantages in judicial efficiency resulting from the "opt out" approach for the protection of the *rara avis* portrayed by petitioner.

We therefore hold that the protection afforded the plaintiff class members by the Kansas statute satisfies the Due Process Clause. The interests of the absent plaintiffs are sufficiently protected by the forum State when those plaintiffs are provided with a request for exclusion that can be returned within a reasonable time to the court. See *Insurance Corp. of Ireland*, 456 U. S., at 702–703, and n. 10. Both the Kansas trial court and the Supreme Court of Kansas held that the class received adequate representation, and no party disputes that conclusion here. We conclude that the Kansas court properly asserted personal jurisdiction over the absent plaintiffs and their claims against petitioner.

III

The Kansas courts applied Kansas contract and Kansas equity law to every claim in this case, notwithstanding that

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[5] The following statutes or procedural rules permit "opt out" notice in some types of class actions:

Fed. Rule Civ. Proc. 23(c)(2)(A); Ala. Rule Civ. Proc. 23(c)(2)(A); Alaska Rule Civ. Proc. 23(c)(2)(A); Ariz. Rule Civ. Proc. 23(c)(2)(A); Cal. Civ. Code Ann. § 1781(e)(1) (West 1973) (consumer class action); Colo. Rule Civ. Proc. 23(c)(2)(A); Del. Ch. Ct. Rule 23(c)(2)(A); D. C. Super. Ct. Rule Civ. Proc. 23(c)(2)(A); Fla. Rule Civ. Proc. 1.220(d)(2)(A); Idaho Rule Civ. Proc. 23(c)(2)(A); Ind. Rule Trial Proc. 23(C)(2)(A); Iowa Rule Civ. Proc. 42.8(b); Kan. Stat. Ann. § 60–223(c)(2) (1983); Ky. Rule Civ. Proc. 23.03(2)(a); Me. Rule Civ. Proc. 23(c)(2)(A); Md. Rule Civ. Proc. 2–231(e)(1); Mich. Ct. Rule 3.501(C)(5)(b); Minn. Rule Civ. Proc. 23.03 (2)(A); Mo. Rule Civ. Proc. 52.08; Mont. Rule Civ. Proc. 23(c)(2)(A); Nev. Rule Civ. Proc. 23(c)(2)(A); N. J. Civ. Prac. Rule 4:32–2; N. Y. Civ. Prac. Law § 904 (McKinney 1976); N. D. Rule Civ. Proc. 23(g)(2)(B); Ohio Rule Civ. Proc. 23(C)(2)(a); Okla. Stat., Tit. 12, § 2023(C)(2)(a) (Supp. 1984–1985); Ore. Rule Civ. Proc. 32F(1)(b)(ii); Pa. Rule Civ. Proc. 1711(a); Tenn. Rule Civ. Proc. 23.03(2)(a); Vt. Rule Civ. Proc. 23(c)(2)(A); Wash. Ct. Rule 23(C)(2)(i); Wyo. Rule Civ. Proc. 23(c)(2)(A).

over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit.[6] Petitioner protested that the Kan-

[6] The Commission approved petitioner's price increases in Opinion Nos. 699, 749, and 770. Petitioner reimbursed royalty owners $3.7, $2.9, and $4.7 million in suspended royalties, respectively. The States where the leases were located and their resident plaintiffs are as follows.

OPINION 699

States	*No. leases in state*	*Royalties to state leases*	*No. royalty owners in state*
Oklahoma	1,266	$ 83,711.35	2,653
Texas	4,414	839,152.73	9,591
Kansas	3	152.88	496
Arkansas	6	3,228.22	173
Louisiana	68	2,187,548.06	1,244
New Mexico	941	433,574.85	621
Illinois	—	—	397
Wyoming	690	148,906.93	413
Mississippi	—	—	67
Utah	—	—	29
West Virginia	—	—	20
No State Code	1	[.05]	1,025
	7,389	$3,696,274.97	

OPINION 749

States	*No. leases in state*	*Royalties to state leases*	*No. royalty owners in state*
Oklahoma	1,948	$ 243,163.49	3,591
Texas	3,479	2,171,217.36	7,881
Kansas	15	2,619.24	553
Arkansas	32	1,769.33	171
Louisiana	178	352,539.45	740
New Mexico	350	22,670.27	339
Illinois	1	1.30	357
Wyoming	68	67,570.01	37
Mississippi	3	694.93	88
Utah	1	184.60	18
West Virginia	32	10,364.61	246
No State Code	2	1,032.59	1,553
	6,109	$2,873,827.18	

[Footnote 6 is continued on p. 816]

sas courts should apply the laws of the States where the leases were located, or at least apply Texas and Oklahoma law because so many of the leases came from those States. The Kansas courts disregarded this contention and found petitioner liable for interest on the suspended royalties as a matter of Kansas law, and set the interest rates under Kansas equity principles.

Petitioner contends that total application of Kansas substantive law violated the constitutional limitations on choice of law mandated by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, § 1. We must first determine whether Kansas law conflicts in any material way with any other law which could apply. There can be no injury in applying Kansas law if it is not in conflict with that of any other jurisdiction connected to this suit.

Petitioner claims that Kansas law conflicts with that of a number of States connected to this litigation, especially Texas and Oklahoma. These putative conflicts range from the direct to the tangential, and may be addressed by the Supreme Court of Kansas on remand under the correct constitutional standard. For example, there is no recorded

OPINION 770

States	*No. leases in state*	*Royalties to state leases*	*No. royalty owners in state*
Oklahoma	1,430	$ 471,122.53	2,684
Texas	3,702	2,615,744.46	8,550
Kansas	4	115.10	504
Arkansas	2	552.83	162
Louisiana	26	516,248.13	361
New Mexico	591	194,799.95	469
Illinois	1	.01	353
Wyoming	476	945,441.09	272
Mississippi	—	—	36
Utah	—	—	18
West Virginia	—	—	22
No State Code	—	—	1,046
	6,232	$4,744,024.10	

Oklahoma decision dealing with interest liability for suspended royalties: whether Oklahoma is likely to impose liability would require a survey of Oklahoma oil and gas law. Even if Oklahoma found such liability, petitioner shows that Oklahoma would most likely apply its constitutional and statutory 6% interest rate rather than the much higher Kansas rates applied in this litigation. Okla. Const., Art XIV, § 2; Okla. Stat., Tit. 15, § 266 (Supp. 1984–1985); *Rendezvous Trails of America, Inc.* v. *Ayers*, 612 P. 2d 1384, 1385 (Okla. App. 1980); *Smith* v. *Robinson*, 594 P. 2d 364 (Okla. 1979); *West Edmond Hunton Lime Unit* v. *Young*, 325 P. 2d 1047 (Okla. 1958).

Additionally, petitioner points to an Oklahoma statute which excuses liability for interest if a creditor accepts payment of the full principal without a claim for interest, Okla. Stat., Tit. 23, § 8 (1951). Cf. *Webster Drilling Co.* v. *Sterling Oil of Oklahoma, Inc.*, 376 P. 2d 236 (Okla. 1962). Petitioner contends that by ignoring this statute the Kansas courts created liability that does not exist in Oklahoma.

Petitioner also points out several conflicts between Kansas and Texas law. Although Texas recognizes interest liability for suspended royalties, Texas has never awarded any such interest at a rate greater than 6%, which corresponds with the Texas constitutional and statutory rate.[7] Tex. Const., Art. 16, § 11; Tex. Rev. Civ. Stat. Ann., Art. 5069–1.03 (Vernon 1971). See *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480 (Tex. 1978); *Phillips Petroleum Co.* v. *Adams*, 513 F. 2d 355 (CA5), cert. denied, 423 U. S. 930 (1975); cf. *Maxey* v. *Texas Commerce Bank*, 580 S. W. 2d 340, 341 (Tex. 1979). Moreover, at least one court interpreting Texas law appears to have held that Texas excuses inter-

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[7] The Kansas interest rate also conflicts with the rate which is applicable in Louisiana. At the time this suit was filed that rate was 7%. See La. Civ. Code Ann., Art. 1938 (1977) (amended in 1982); *Wurzlow* v. *Placid Oil Co.*, 279 So. 2d 749, 772–774 (La. App. 1973) (applying Art. 1938 to oil and gas royalties).

est liability once the gas company offers to take an indemnity from the royalty owner and pay him the suspended royalty while the price increase is still tentative. *Phillips Petroleum Co.* v. *Riverside Gas Compression Co.*, 409 F. Supp. 486, 495–496 (ND Tex. 1976). Such a rule is contrary to Kansas law as applied below, but if applied to the Texas plaintiffs or leases in this case, would vastly reduce petitioner's liability.

The conflicts on the applicable interest rates, alone—which we do not think can be labeled "false conflicts" without a more thoroughgoing treatment than was accorded them by the Supreme Court of Kansas—certainly amounted to millions of dollars in liability. We think that the Supreme Court of Kansas erred in deciding on the basis that it did that the application of its laws to all claims would be constitutional.

Four Terms ago we addressed a similar situation in *Allstate Ins. Co.* v. *Hague*, 449 U. S. 302 (1981). In that case we were confronted with two conflicting rules of state insurance law. Minnesota permitted the "stacking" of separate uninsured motorist policies while Wisconsin did not. Although the decedent lived in Wisconsin, took out insurance policies and was killed there, he was employed in Minnesota, and after his death his widow moved to Minnesota for reasons unrelated to the litigation, and was appointed personal representative of his estate. She filed suit in Minnesota courts, which applied the Minnesota stacking rule.

The plurality in *Allstate* noted that a particular set of facts giving rise to litigation could justify, constitutionally, the application of more than one jurisdiction's laws. The plurality recognized, however, that the Due Process Clause and the Full Faith and Credit Clause provided modest restrictions on the application of forum law. These restrictions required "that for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.*, at 312–313. The

dissenting Justices were in substantial agreement with this principle. *Id.*, at 332 (opinion of POWELL, J., joined by BURGER, C. J., and REHNQUIST, J.). The dissent stressed that the Due Process Clause prohibited the application of law which was only casually or slightly related to the litigation, while the Full Faith and Credit Clause required the forum to respect the laws and judgments of other States, subject to the forum's own interests in furthering its public policy. *Id.*, at 335–336.

The plurality in *Allstate* affirmed the application of Minnesota law because of the forum's significant contacts to the litigation which supported the State's interest in applying its law. See *id.*, at 313–329. Kansas' contacts to this litigation, as explained by the Kansas Supreme Court, can be gleaned from the opinion below.

Petitioner owns property and conducts substantial business in the State, so Kansas certainly has an interest in regulating petitioner's conduct in Kansas. 235 Kan., at 210, 679 P. 2d, at 1174. Moreover, oil and gas extraction is an important business to Kansas, and although only a few leases in issue are located in Kansas, hundreds of Kansas plaintiffs were affected by petitioner's suspension of royalties; thus the court held that the State has a real interest in protecting "the rights of these royalty owners both as individual residents of [Kansas] and as members of this particular class of plaintiffs." *Id.*, at 211–212, 679 P. 2d, at 1174. The Kansas Supreme Court pointed out that Kansas courts are quite familiar with this type of lawsuit, and "[t]he plaintiff class members have indicated their desire to have this action determined under the laws of Kansas." *Id.*, at 211, 222, 679 P. 2d, at 1174, 1181. Finally, the Kansas court buttressed its use of Kansas law by stating that this lawsuit was analogous to a suit against a "common fund" located in Kansas. *Id.*, at 201, 211–212, 679 P. 2d, at 1168, 1174.

We do not lightly discount this description of Kansas' contacts with this litigation and its interest in applying its law. There is, however, no "common fund" located in Kansas that

would require or support the application of only Kansas law to all these claims. See, *e. g.*, *Hartford Life Ins. Co.* v. *Ibs*, 237 U. S. 662 (1915). As the Kansas court noted, petitioner commingled the suspended royalties with its general corporate accounts. 235 Kan., at 201, 679 P. 2d, at 1168. There is no specific identifiable res in Kansas, nor is there any limited amount which may be depleted before every plaintiff is compensated. Only by somehow aggregating all the separate claims in this case could a "common fund" in any sense be created, and the term becomes all but meaningless when used in such an expansive sense.

We also give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evinced their desire to be bound by Kansas law. Even if one could say that the plaintiffs "consented" to the application of Kansas law by not opting out, plaintiff's desire for forum law is rarely, if ever controlling. In most cases the plaintiff shows his obvious wish for forum law by filing there. "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." *Allstate*, *supra*, at 337 (opinion of POWELL, J.). Even if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance. *John Hancock Mut. Life Ins. Co.* v. *Yates*, 299 U. S. 178, 182 (1936); *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 408 (1930). In *Allstate* the plaintiff's move to the forum was only relevant because it was unrelated and prior to the litigation. 449 U. S., at 318–319. Thus the plaintiffs' desire for Kansas law, manifested by their participation in this Kansas lawsuit, bears little relevance.

The Supreme Court of Kansas in its opinion in this case expressed the view that by reason of the fact that it was adjudicating a nationwide class action, it had much greater latitude in applying its own law to the transactions in question than might otherwise be the case:

> "The general rule is that the law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred. . . . Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law. . . . Compelling reasons do not exist to require this court to look to other state laws to determine the rights of the parties involved in this lawsuit." 235 Kan., at 221–222, 679 P. 2d, at 1181.

We think that this is something of a "bootstrap" argument. The Kansas class-action statute, like those of most other jurisdictions, requires that there be "common issues of law or fact." But while a State may, for the reasons we have previously stated, assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of substantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be a "common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary

or unfair. *Allstate*, 449 U. S., at 312–313. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.[8]

When considering fairness in this context, an important element is the expectation of the parties. See *Allstate*, *supra*, at 333 (opinion of POWELL, J.). There is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control. Neither the Due Process Clause nor the Full Faith and Credit Clause requires Kansas "to substitute for its own [laws], applicable to persons and events within it, the conflicting statute of another state," *Pacific Employees Ins. Co.* v. *Industrial Accident Comm'n*, 306 U. S. 493, 502 (1939), but Kansas "may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Home Ins. Co.* v. *Dick*, *supra*, at 410.

Here the Supreme Court of Kansas took the view that in a nationwide class action where procedural due process guar-

[8] In this case the Kansas Supreme Court held that "[t]he trial court did not determine whether any difference existed between the laws of Kansas and other states or whether another state's law should be applied." 235 Kan. 195, 221, 679 P. 2d 1159, 1180 (1984). Respondents contend that the trial court and the Supreme Court actually incorporated by reference the opinion in *Shutts, Executor*, 222 Kan. 527, 567 P. 2d 1292 (1977), where the court looked to the Texas and Oklahoma interest rate statutes and found them inapplicable. We do not think that the Kansas Supreme Court fully adopted the choice-of-law discussion in *Shutts, Executor* as its holding in this case. But even if we agreed that *Shutts, Executor* was somehow incorporated below, that would be insufficient. *Shutts, Executor* was a pre-*Allstate* case involving only 2 other States, rather than the 10 present here. Moreover, the gas region involved in *Shutts, Executor* was primarily within Kansas borders. *Shutts, Executor* only considered the conflict involving interest rate liability and state statutes, and in finding the 6% Texas rate inapplicable it cited but did not follow contrary Texas precedent. 222 Kan., at 562–565, 567 P. 2d, at 1317–1319.

antees of notice and adequate representation were met, "the law of the forum should be applied unless compelling reasons exist for applying a different law." 235 Kan., at 221, 679 P. 2d, at 1181. Whatever practical reasons may have commended this rule to the Supreme Court of Kansas, for the reasons already stated we do not believe that it is consistent with the decisions of this Court. We make no effort to determine for ourselves which law must apply to the various transactions involved in this lawsuit, and we reaffirm our observation in *Allstate* that in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations laid down in cases such as *Allstate* and *Home Ins. Co.* v. *Dick*, *supra*, must be respected even in a nationwide class action.

We therefore affirm the judgment of the Supreme Court of Kansas insofar as it upheld the jurisdiction of the Kansas courts over the plaintiff class members in this case, and reverse its judgment insofar as it held that Kansas law was applicable to all of the transactions which it sought to adjudicate. We remand the case to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE POWELL took no part in the decision of this case.

JUSTICE STEVENS, concurring in part and dissenting in part.

For the reasons stated in Parts I and II of the Court's opinion, I agree that the Kansas courts properly exercised jurisdiction over this class action. I also recognize that the use of the word "compelling" in a portion of the Kansas Supreme Court's opinion, when read out of context, may create an inaccurate impression of that court's choice-of-law holding. See *ante*, at 821. Our job, however, is to review judgments, not to edit opinions, and I am firmly convinced that there is no constitutional defect in the judgment under review.

As the Court recognizes, there "can be no [constitutional] injury in applying Kansas law if it is not in conflict with that

of any other jurisdiction connected to this suit." *Ante*, at 816. A fair reading of the Kansas Supreme Court's opinion in light of its earlier opinion in *Shutts* v. *Phillips Petroleum Co.*, 222 Kan. 527, 567 P. 2d 1292 (1977) (hereinafter *Shutts I*), cert. denied, 434 U. S. 1068 (1978), reveals that the Kansas court has examined the laws of connected jurisdictions and has correctly concluded that there is no "direct" or "substantive" conflict between the law applied by Kansas and the laws of those other States. Cf. *ante*, at 816, 821–822. Kansas has merely developed general common-law principles to accommodate the novel facts of this litigation—other state courts either agree with Kansas or have not yet addressed precisely similar claims. Consequently, I conclude that the Full Faith and Credit Clause of the Constitution[1] did not require Kansas to apply the law of any other State, and the Fourteenth Amendment's Due Process Clause[2] did not prevent Kansas from applying its own law in this case.

The Court errs today because it applies a loose definition of the sort of "conflict" of laws required to state a *constitutional* claim, allowing Phillips a tactical victory here merely on allegations of "putative" or "likely" conflicts. *Ante*, at 816, 817. The Court's choice-of-law analysis also treats the two relevant constitutional provisions as though they imposed the same constraints on the forum court. In my view, however, the potential impact of the Kansas choice on the interests of other sovereign States and the fairness of its decision to the litigants should be separately considered. See *Allstate Insurance Co.* v. *Hague*, 449 U. S. 302, 320 (1981) (STEVENS, J., concurring in judgment). For both inquiries, it

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[1] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. IV, § 1. See also 28 U. S. C. § 1738.

[2] "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U. S. Const., Amdt. 14, § 1.

is essential to have a better understanding of the merits of the underlying dispute than can be gleaned from the Court's opinion. I therefore begin with an explanation of the background of this litigation.

I

Petitioner (Phillips) is a large independent producer, purchaser, and seller of natural gas. Beginning in 1954, the prices at which it sold natural gas to interstate pipeline companies were regulated by the Federal Power Commission (Commission).[3] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672 (1954). As a party to a large number of producing oil and gas leases, Phillips is obligated to pay a percentage of the value of the production, usually one-eighth, to persons owning an interest in the leased areas, so-called "royalty owners." Some royalty owners are due monthly royalties by contractual agreements made directly with Phillips. See *Shutts I*, *supra*, at 532, 567 P. 2d, at 1298. Others are due royalties under contracts made with other gas producers who then sell their gas to Phillips—by separate contract with those producers, Phillips has "assumed the producer's responsibility to distribute the royalties . . . to the royalty owners." 235 Kan. 195, 218, 679 P. 2d 1159, 1178 (1984). The relationship between Phillips and the royalty owners is not regulated by the Commission although it is, of course, materially affected by the Commission's control over the pricing relationship between Phillips and its customers.

In a series of orders entered after 1954, the Commission established a practice of suspending price increases proposed by Phillips until approved by the Commission, but allowing Phillips to collect the higher proposed prices upon the filing by Phillips with the Commission of a corporate undertaking to refund to its customers any portion of an increase

[3] The responsibilities of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission in 1977. See 91 Stat. 578, 582–584.

that is ultimately disapproved by the Commission. Pursuant to Commission regulation, Phillips agrees that unapproved prices it collects are subject to refund "with interest at seven percent (7%) per annum from the date of receipt until September 18, 1970, and eight percent (8%) per annum thereafter until paid out, if the FPC [does] not approve the sales price." *Shutts I*, *supra*, at 533, 567 P. 2d, at 1299 (emphasis deleted) (citing 18 CFR § 154.102(c) (1977) and Commission opinion No. 586, 44 F. P. C. 761, 791 (1970)). Phillips' receipts during periods when its proposed price increases have not yet received final approval therefore include two components—the "firm" proceeds and the "FPC suspense money." For example, while an increase in price from 11 cents per Mcf (thousand cubic feet) to 13 cents is under consideration, the collection of the higher price would include firm proceeds of 11 cents and 2 cents of FPC suspense money.

In July 1961, while a price increase applicable to the tri-state Hugoton-Anadarko area (Kansas, Oklahoma, and Texas) was pending, Phillips sent a notice to the royalty owners for that area advising them that "until further notice" they would be paid royalties on the basis of firm proceeds only and that royalties based on suspense money would be paid only after it was "determined that the sums collected are no longer subject to refund." The notice also advised the royalty owners that they could receive ongoing payment of royalties on the suspense money as well if they furnished Phillips with an "acceptable indemnity to cover their proportionate part of any required refunds, *plus the required interest.*" *Shutts I*, 222 Kan., at 534, 567 P. 2d, at 1299 (emphasis added).[4] The indemnity which Phillips required was a cor-

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[4] The relevant portion of the 1961 notice provided in full:

"Effective June 1, 1961, and until further notice, royalties paid you will be computed by excluding that portion of any price being collected subject to refund which exceeds 11 [cents] per Mcf (presently the maximum area

porate security bond covering a principal amount based on estimated production for a 2-year period, plus the 7% interest rate Phillips would be required to pay to its customers if the price increase were not approved. Only 17 royalty owners provided Phillips with such an indemnity; approximately 6,400 royalty owners who did not do so did not receive royalties on the suspense proceeds until 11 years later, after the price increase was finally approved. The situation was succinctly summarized by the Kansas Supreme Court in *Shutts I:*

> "From June 1, 1961, to October 1, 1970, Phillips deposited the increased rate monies collected *in its general account and commingled it with its other funds*, without ever giving notice of this fact to royalty owners during the time it was holding money. It is important to note that during this period of time *Phillips had no entitlement to the gas royalty owners' share of the 'suspense royalties,' whether or not the rates were approved by the FPC*. Phillips never owned this money. While Phillips collected eight-eighths (8/8) of the increased rates, under no condition was the one-eighth (1/8) of the increase attributable to the royalty owners ever to go to Phillips. That royalty share, according to eventual FPC ruling, was either to go to Phillips' royalty owners, or back to Phillips' gas purchasers with interest, or part to one and part to the other." *Id.*, at 535, 567 P. 2d, at 1300 (emphasis in original).

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price level for increased rates as recently announced by the Federal Power Commission in its Statement of General Policy). Payment of royalty based on the balance of the sums collected will be made at such time as it is determined that the sums collected are no longer subject to refund.

"Interest owners desiring to receive payments computed currently on the full sums being collected may arrange to do so by furnishing Phillips Petroleum Company acceptable indemnity to cover their proportionate

In 1970, the Commission entered an order approving Phillips' Hugoton-Anadarko price increases to the extent of approximately $153,000,000 and disapproving them to the extent of approximately $29,000,000. Thus, over 18% of the suspense money had to be refunded to Phillips' customers, with interest at the rates to which Phillips had agreed under Commission regulation. Having no jurisdiction over the relationship between Phillips and the royalty owners, however, the Commission's order was silent on the subject of royalties on the $153 million of suspense money that did not have to be refunded. After the Commission's order was finally affirmed by the Ninth Circuit in 1972, *In re Hugoton-Anadarko Area Rate Case*, 466 F. 2d 974, Phillips mailed checks to the royalty owners for their share of the suspense moneys based on the approved higher prices that had been collected since 1961. However, "Phillips neither paid nor offered to pay any interest for the use of the money, nor did Phillips say anything about interest or how long the money had been held or used by Phillips." *Shutts I*, *supra*, at 537, 567 P. 2d, at 1301.

The foregoing facts gave rise to *Shutts I*. This case *(Shutts II)* involves suspense royalties due on similar price increases approved in 1976, 1977, and 1978 to a larger number of royalty owners (28,100) with interests in leased areas located in 11 States, including Kansas. Otherwise, however, "[w]ith a few exceptions this case is similar in legal issues and factual situation to that presented in *Shutts [I]*." 235 Kan., at 198, 679 P. 2d, at 1165. Both cases involve what the Kansas Supreme Court has characterized as a "common fund" consisting of the suspense royalties undeniably owed by Phil-

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part of any required refunds, plus the required interest." *Shutts I*, 222 Kan., at 534, 567 P. 2d, at 1299.

The practice of withholding suspense royalties pending final Commission price approval was sustained in *Ashland Oil & Refining Co.* v. *Staats, Inc.*, 271 F. Supp. 571, 579 (Kan. 1967), and *Boutte* v. *Chevron Oil Co.*, 316 F. Supp. 524 (ED La. 1970), aff'd, 442 F. 2d 1337 (CA5 1971) *(per curiam)*.

lips but not paid for periods of several years while Commission approval of rate increases were pending.[5] It is undisputed that Phillips enjoyed the unfettered use of that money. See 222 Kan., at 560, 567 P. 2d, at 1316 (testimony of Phillips' Treasurer). It is also undisputed that when the Commission proceedings ended, none of the money could be retained by Phillips. To the extent that a price increase was disapproved, a refund to the purchasing pipelines, plus interest at the rate set by the Commission, would be required; to the extent that the increases were approved, the money was contractually owed to the royalty owners. As the Kansas court noted: "What is significant is these gas royalty suspense monies never did nor could belong to Phillips." *Ibid.* (emphasis deleted).[6]

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[5] "Had Phillips put the 'suspense royalties' into a common trust fund, separate from its operating funds, to be used solely to pay either the pipeline companies or the gas royalty owners once the FPC ultimately decided the rate increase question, this case would dovetail nicely into the 'common fund' cases." *Shutts I*, 222 Kan., at 552, 567 P. 2d, at 1311. Accord, 235 Kan., at 201, 212, 679 P. 2d, at 1168, 1174. The Court criticizes Kansas' use of the "common fund" concept as applied to these funds. *Ante*, at 819–820. Kansas is not alone, however, in applying the common fund concept in a class action to a pool of readily identifiable moneys placed within the court's power by a liability determined by the lawsuit itself. See, *e. g.*, *Perlman* v. *First National Bank of Chicago*, 15 Ill. App. 3d 784, 799–802, 305 N. E. 2d 236, 247–250 (1973) (cited in *Shutts I*, 222 Kan., at 553, 567 P. 2d, at 1311–1312); see also *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166–167 (1939) (common fund may be "recovered" in litigation); Dawson, Lawyers and Involuntary Clients: Attorney Fees From Funds, 87 Harv. L. Rev. 1597, 1615 (1974) ("Funds can also be created by the litigation itself"). Moreover, it is of course no concern of this Court how Kansas chooses to develop its state common-law doctrines. Absent some constitutional foundation plainly lacking here, the Court's criticism of Kansas' substantive state law is entirely gratuitous.

[6] Phillips argued below that some distinction should be made for purposes of interest liability between royalties owed on gas sold to pipeline companies who paid the higher "suspense" price and royalties owed on gas used by Phillips itself rather than sold. Yet "Phillips acknowledges . . . that its obligation to pay royalities under the various . . . contracts *exists*

In *Shutts I*, the Kansas Supreme Court held that general equitable principles required the award of interest on royalties owed to royalty owners but used by Phillips for a number of years. In support of that conclusion it relied on general statements in two Kansas cases[7] and a long line of federal cases applying *Texas* law and concluding that equity requires "the award of interest on suspense royalties under similar circumstances." *Id.*, at 561, 567 P. 2d, at 1317.[8] The court noted that Oklahoma had no decisions allowing interest on suspense royalties, but concluded that "several Oklahoma decisions hold that interest may be awarded on equitable grounds where necessary to arrive at a fair compensation. (*Smith* v. *Owens*, 397 P. 2d 673 [Okla. 1963]; and *First Nat. Bank & T. Co.* v. *Exchange Nat. Bank and T. Co.*, 517 P. 2d 805 [Okla. App. 1973])."[9] Finally, the court construed the royalty agreements at issue as containing a "contractual

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without regard to the actual disposition of the gas." 235 Kan., at 215, 679 P. 2d, at 1177 (emphasis added). Thus, "[b]y choosing to withhold payment Phillips was allowed the use of the suspense monies during the suspense period which rightfully belonged to the royalty owners, and the royalty owners, in turn, were deprived of receiving and using those monies during that time." *Id.*, at 216, 679 P. 2d, at 1177. Applying the same unjust enrichment theory developed in *Shutts I*, the Kansas Supreme Court accordingly rejected Phillips' proffered distinction. 235 Kan., at 217, 679 P. 2d, at 1178. Significantly, Phillips does not claim here that even a "putative" conflict of laws might turn on this distinction. Phillips pursues the argument only to contend in a footnote that, because it never actually collected higher prices on gas that it used itself, no "fund" actually existed. Brief for Petitioner 21, n. 18. As the Kansas court noted, however, the fund at issue is the "easily computed" amount of *royalties* that were due the royalty owners in any case, not the moneys collected by Phillips in return for sales. 235 Kan., at 217, 679 P. 2d, at 1178.

[7] *Lightcap* v. *Mobil Oil Corp.*, 221 Kan. 448, 562 P. 2d 1, cert. denied, 434 U. S. 876 (1977); *Shapiro* v. *Kansas Public Employees Retirement System*, 216 Kan. 353, 357, 532 P. 2d 1081, 1084 (1975).

[8] The court cited six cases, four from the Fifth Circuit and two from the Northern District of Texas, in all of which Phillips was a named party.

[9] The Kansas court also pointed out that "the United States Supreme Court has noted the imposition of interest on refunds ordered by the FPC is not an inappropriate means of preventing unjust enrichment. (*United*

obligation" to pay interest on the royalties "for the period of time the suspense money was held and used by Phillips." *Id.*, at 562, 567 P. 2d, at 1317. Thus the Kansas court also found its result consistent with the only Texas state-court decision on point, *Stahl Petroleum Co.* v. *Phillips Petroleum Co.*, 550 S. W. 2d 360 (Tex. Civ. App. 1977), which had "awarded interest on suspended royalties" based on "the terms of the royalty agreement . . . rather than unjust enrichment." 222 Kan., at 561, 567 P. 2d, at 1317. Significantly, when the Texas Supreme Court subsequently affirmed the *Stahl* judgment, it relied on the Kansas Supreme Court's decision in *Shutts I* to decide that equity as well as contract law requires interest on suspense royalties. *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480, 485–488, and n. 5 (1978).

After determining that Phillips was liable for interest on the suspense royalties, the court reversed the trial court's decision that the rate should be 6% because that was the statutory interest rate in Kansas, Oklahoma, and Texas. The Kansas Supreme Court noted that the statutory rate in all three States expressly applied only when no other rate had been agreed upon,[10] and that in this case Phillips had made an express agreement, evidenced by its corporate undertaking, to pay interest at the rate set by the Commission on suspense moneys found refundable. 222 Kan., at 564, 567 P. 2d, at 1319. The Kansas court therefore declined to apply *any* State's interest statute, including its own. "[E]quitable principles require, and contractual principles dictate, that the royalty owners receive the same treatment" as refunded pur-

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Gas v. *Callery Properties*, 382 U. S. 223)." 222 Kan., at 562, 567 P. 2d, at 1317–1318.

[10] See Kan. Stat. Ann. § 16–201 (1974) ("Creditors shall be allowed to receive interest at the rate of six percent per annum, *when no other rate of interest is agreed upon*"); Okla. Stat., Tit. 15, § 266 (1971) ("The legal rate of interest shall be six per cent *in the absence of any contract* as to the rate of interest"); Tex. Rev. Civ. Stat. Ann., Art. 5069–1.03 (Vernon 1971) ("*When no specified rate of interest is agreed upon by the parties*, interest at the rate of 6% per annum shall be allowed") (all emphasis added).

chasers, that is, payment at the same FPC rate of interest.[11] *Id.*, at 563, 567 P. 2d, at 1318.

Finally, the Kansas Supreme Court rejected Phillips' contention that royalty owners had "waived" their claims to interest by accepting payment of the royalties later or by failing to post an indemnity "acceptable" to Phillips in order to receive contemporaneous payment of suspense royalties. The court noted that the "conditions imposed by Phillips were far more stringent than the corporate undertaking Phillips filed with the FPC," *id.*, at 567, 567 P. 2d., at 1320, and concluded that it was "apparent [that] Phillips' previous imposition of burdensome conditions upon royalty owners . . . was designed to accomplish precisely what the facts disclose. Virtually none of the royalty owners complied with the conditions, thereby leaving the suspense royalties in the hands of Phillips as stakeholder to use at its pleasure . . . ." *Id.*, at 566, 567 P. 2d, at 1320. The court found the rule that "payment of the principal sum is a legal bar to a subsequent action for interest" inapplicable on these facts. *Id.*, at 567, 567 P. 2d, at 1321. Instead, because "payment of [the royalties due] to the plaintiff class members, instead of extinguishing the debt, constituted only a partial payment on an interest-bearing debt[,] [t]his situation invokes application of the so-called 'United States Rule,' which provides that in applying partial payments to an interest-bearing debt which is due, in

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[11] The court also held that interest accruing after the entry of judgment should be determined by Kansas' postjudgment interest statute. Kan. Stat. Ann. § 16–204 (1974). Phillips does not and could not contend that the Constitution bars a Kansas court from applying the Kansas postjudgment interest statute to judgments entered by Kansas courts. Such statutes demonstrate an irrefutable state interest in the force carried by judgments entered by a State's own courts. See also *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 498 (1941) (State interest statutes concern "an incidental item of damages, interest, with respect to which courts at the forum have commonly been free to apply their own or some other law as they see fit").

the absence of an agreement or statute to the contrary, the payment should be first applied to the interest due." *Ibid.*[12]

In *Shutts II*, the case now under review, the Kansas Supreme Court adopted its earlier analysis in *Shutts I* without repeating it. "Although a larger class is involved than in *Shutts I*, the legal issues presented are substantially the same. While these issues are complex they were thoroughly reviewed in *Shutts I*." 235 Kan., at 211, 679 P. 2d, at 1174.[13] Noting that "Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I*," the Kansas court went on to state that once jurisdiction over

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[12] The court noted that the "'United States Rule' is also followed in Oklahoma and Texas," and that Phillips had "raised and lost" its contention of waiver in a similar case in Texas. 222 Kan., at 568, 567 P. 2d, at 1321, citing *Phillips Petroleum Co.* v. *Riverview Gas Compression Co.*, 409 F. Supp. 486 (ND Tex. 1976). Moreover, because the relevant Oklahoma statute expressly stated that payment of a principal sum must be accepted "as such" to support a finding of waiver, Okla. Stat., Tit. 23, § 8 (1971), the statute was inapplicable here inasmuch as the royalty payments were not so accepted. 222 Kan., at 568, 567 P. 2d, at 1321.

[13] The only apparently new argument raised by Phillips in *Shutts II* was that it should not be liable for interest to a subclass of the affected royalty owners whose direct contractual agreement for royalties was with other producers who sold their gas to Phillips under a separate agreement. Although Phillips assumed the obligation to pay royalties directly to the royalty owners in these separate agreements, the separate agreements also stated that if a suspended price increase were ultimately approved by the Commission, Phillips would pay the *other producers* additional money "without interest." Phillips argued that this "without interest" clause barred interest to the royalty owners as well as to the other producers. The Kansas Supreme Court rejected this argument, however, because the royalty owners were not parties to the separate agreements and because no consideration was paid to the royalty owners by Phillips in return for this purported waiver of interest. 235 Kan., at 220, 679 P. 2d, at 1180. "[T]hese provisions, entered into between Phillips and the producers, cannot unilaterally deprive royalty owners of interest which they would otherwise be entitled to receive under casinghead gas contracts in which the provisions do not appear." *Ibid.*

a "nationwide class action" is properly asserted, "the law of the forum should be applied unless compelling reasons exist for applying a different law." *Id.*, at 221, 679 P. 2d, at 1181.

II

This Court, of course, can have no concern with the substantive merits of common-law decisions reached by state courts faithfully applying their own law or the law of another State. When application of purely state law is at issue, "[t]he power delegated to us is for the restraint of unconstitutional [actions] by the States, and not for the correction of alleged errors committed by their judiciary." *Commercial Bank of Cincinnati* v. *Buckingham's Executors*, 5 How. 317, 343 (1847). The Constitution does not expressly mandate particular or correct choices of law. Rather, a state court's choice of law can invoke constitutional protections, and hence our jurisdiction, only if it contravenes some explicit constitutional limitation.[14]

Thus it has long been settled that "a mere misconstruction by the forum of the laws of a sister State is not a violation of the Full Faith and Credit Clause." *Carroll* v. *Lanza*, 349 U. S. 408, 414, n. 1 (1955) (Frankfurter, J., dissenting).[15] That Clause requires only that States accord "full faith and credit" to other States' laws—that is, acknowledge the validity and finality of such laws and attempt in good faith to apply them when necessary as they would be applied by home state

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[14] See 28 U. S. C. § 1257: "Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . (3) [b]y writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed *under the Constitution*" (emphasis added).

[15] This principle was settled in a number of cases decided on either side of the turn of this century. See, *e. g.*, *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96 (1917); *Western Life Indemnity Co.* v. *Rupp*, 235 U. S. 261, 275 (1914); *Louisville & Nashville R. Co.* v. *Melton*, 218 U. S. 36, 51, 52 (1910); *Allen* v. *Alleghany Co.*, 196 U. S. 458, 464–465 (1905); *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 (1903); *Glenn* v. *Garth*, 147 U. S. 360, 367–370 (1893).

courts.[16] But as Justice Holmes explained, when there is "nothing to suggest that [one State's court] was not candidly construing [another State's law] to the best of its ability, . . . even if it was wrong something more than an error of construction is necessary" to invoke the Constitution. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96 (1917).

Merely to state these general principles is to refute any argument that Kansas' decision below violated the Full Faith and Credit Clause. As the opinion in *Shutts I* indicates, the Kansas court made a careful survey of the relevant laws of Oklahoma and Texas, the only other States whose law is proffered as relevant to this litigation. But, as the Court acknowledges, *ante*, at 816–818, no other State's laws or judicial decisions were precisely on point, and, in the Kansas court's judgment, roughly analogous Texas and Oklahoma cases supported the results the Kansas court reached. The Kansas court expressly declared that, in a multistate action, a "court should also give careful consideration, as we have attempted to do, to any possible conflict of law problems." 222 Kan., at 557, 567 P. 2d, at 1314.[17] While a common-law judge might disagree with the substantive legal determinations made by the Kansas court (although nothing in its opinion seems erroneous to me), that court's approach to the possible choices of law evinces precisely the "full faith and credit" that the Constitution requires.

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[16] Cf. *Guaranty Trust Co.* v. *New York*, 326 U. S. 99, 109 (1945) (federal courts should apply state law in furtherance of the goal that "the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court").

[17] The Kansas court also stated that Kansas' statutory class-action requirements would "not be fulfilled" if "liability is to be determined according to varying and inconsistent state laws." 222 Kan., at 557, 567 P. 2d, at 1314. This belies any notion that the Kansas court plans to "bootstrap," *ante*, at 821, its choice-of-law decisions onto its assertion of jurisdiction over multistate actions; precisely the opposite is suggested.

It is imaginable that even a good-faith review of another State's law might still "unjustifiably infring[e] upon the legitimate interests of another State" so as to violate the Full Faith and Credit Clause. *Allstate*, 449 U. S., at 323 (STEVENS, J., concurring in judgment). If, for example, a Texas oil company or a Texas royalty owner with an interest in a Texas lease were treated directly contrary to a stated policy of the State of Texas by a Kansas court through some honest blunder, the Constitution might bar such "parochial entrenchment" on Texas' interests. *Thomas* v. *Washington Gas Light Co.*, 448 U. S. 261, 272 (1980) (plurality opinion).[18] But this case is so distant from such a situation that I need not pursue this theoretical possibility. Even Phillips does not contend that any stated policies of other States have been plainly contravened, and the Court's discussion is founded merely on an *absence* of reported decisions and the Court's speculation of what Oklahoma or Texas courts might "most likely" do in a case like this. *Ante*, at 817. There is simply no demonstration here that the Kansas Supreme Court's decision has impaired the legitimate interests of any other States or infringed on their sovereignty in the slightest.

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[18] As I noted in *Allstate*, however, the litigant challenging a court's choice of law clearly "bears the burden of establishing" a constitutional infringement. 449 U. S., at 325, n. 13. "*Prima facie* every state is entitled to enforce in its own courts its own statutes . . . . One who challenges that right . . . assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum." *Alaska Packers Assn.* v. *Industrial Accident Comm'n*, 294 U. S. 532, 547 (1935). See *Western Life Indemnity Co.* v. *Rupp*, 235 U. S., at 275 ("It does not appear that the court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it"). Thus, if a litigant has failed to call a state court's attention to relevant law in other jurisdictions, it cannot raise that law here to create a constitutional issue.

III

It is nevertheless possible for a State's choice of law to violate the Constitution because it is so "totally arbitrary or . . . fundamentally unfair" to a litigant that it violates the Due Process Clause. *Allstate*, 449 U. S., at 326 (STEVENS, J., concurring in judgment). If the forum court has no connection to the lawsuit other than its jurisdiction over the parties, a decision to apply the forum State's law might so "frustrat[e] the justifiable expectations of the parties" as to be unconstitutional. *Id.*, at 327.[19]

Again, however, a constitutional claim of "unfair surprise" cannot be based merely upon an unexpected choice of a particular State's law—it must rest on a persuasive showing of an unexpected *result* arrived at by application of that law. Thus, absent any *conflict* of laws, in terms of the results they produce, the Due Process Clause simply has not been violated. This is because the underlying theory of a choice-of-law due process claim must be that parties plan their conduct and contractual relations based upon their legitimate expec-

[19] I noted in *Allstate* that choice of forum law might also violate the Due Process Clause in other ways, such as by irrationally favoring residents over nonresidents or representing a "dramatic departure from the rule that obtains in most American jurisdictions." 449 U. S., at 327. The first possibility is not applicable here; all royalty owners were treated exactly alike in the Kansas court's analysis. As for the second possibility, a "dramatic departure" must be distinguished from the application of general equitable principles to address new situations. Phillips may criticize Kansas' allegedly "unique notions of contract and oil and gas law," Brief for Petitioner 33, but such is not a *constitutional* objection. State courts, like this Court, constantly must apply and develop general legal principles to accommodate novel factual circumstances with the overarching goal of achieving a just result. Today's decision, for example, newly establishes lawful jurisdiction over a multistate plaintiffs' class action that Phillips likely could not have anticipated 15 years ago. Absent some demonstration of a *departure* from some clear *rule* obtaining in other States, an argument merely that "[n]o other state ever has hinted" at Kansas' result, *id.*, at 32, is unavailing.

tations concerning the subsequent legal consequences of their actions. For example, they might base a decision on the belief that the law of a particular State will govern. But a change in that State's law in the interim between the execution and the performance of the contract would not violate the Due Process Clause. Nor would the Constitution be violated simply because a state court made an unanticipated ruling on a previously unanswered question of law—perhaps a choice-of-law question.

In this case it is perfectly clear that there has been no due process violation because this is a classic "false conflicts" case.[20] Phillips has not demonstrated that any significant conflicts exist merely because Oklahoma and Texas state case law is *silent* concerning the equitable theories developed by the Kansas courts in this litigation, or even because the language of some Oklahoma and Texas statutes suggests that those States would "most likely" reach different results. *Ante*, at 816–818. The Court's heavy reliance on the characterization of the law provided by Phillips is not an adequate substitute for a neutral review. *Ante*, at 816, 817 ("Petitioner claims," "petitioner shows," "petitioner points to," "Petitioner also points out . . ."). As is unmistakable from a review of *Shutts I*, the Kansas Supreme Court has examined the same laws cited by the Court today as indicative of "direct" conflicts, and construed them as supportive of the

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[20] "'[F]alse conflict' really means 'no conflict of laws.' If the laws of both states relevant to the set of facts are the same, or would produce the same decision in the lawsuit, there is no real conflict between them." R. Leflar, American Conflicts Law § 93, p. 188 (3d ed. 1977). See also E. Scoles & P. Hay, Conflict of Laws § 2.6, p. 17 (1982) ("A 'false conflict' exists when the potentially applicable laws do not differ"). The absence of any direct conflicts here distinguishes this case from decisions such as *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930), and *John Hancock Mutual Life Ins. Co.* v. *Yates*, 299 U. S. 178 (1936), where the interstate legal conflicts were clear, conceded, and dispositive.

Kansas result.[21] Our precedents, to say nothing of the Constitution and our statutory jurisdiction to review state-court judgments, do not permit the Court to second-guess these substantive judgments. Moreover, an independent examination demonstrates solid support for the Kansas court's conclusions.[22]

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[21] In *Shutts II* the Kansas Supreme Court noted that "the legal issues presented are substantially the same" as in *Shutts I*, and that "[w]hile these issues are complex they were thoroughly reviewed in *Shutts I*." 235 Kan., at 211, 679 P. 2d, at 1174. The court then addressed the award and rate of interest as "damages to compensate the plaintiffs for the unjust enrichment derived by Phillips from the use of the plaintiffs' money," and concluded that "[i]n the instant case Phillips has not satisfactorily established why this court should not apply the rule enunciated in *Shutts I*" respecting this claim. *Id.*, at 221, 679 P. 2d, at 1181. Two sentences later in the same paragraph, the court made the broad statement that its forum law should apply absent "compelling reason." The only fair reading of this statement in context is that the Kansas court in *Shutts II* adopted its multistate choice-of-law survey performed in *Shutts I*, and properly placed the burden on Phillips, see n. 18, *supra*, to show why the *Shutts I* conclusions should be reexamined. Even if this were ambiguous, this Court should give the Kansas Supreme Court the benefit of the doubt when reviewing its judgment. Thus, I frankly do not understand the Court's summary rejection of that court's attempt to incorporate *Shutts I*. *Ante*, at 822, n. 8. As for the implication in that same footnote that the choice-of-law discussion in *Shutts I* may have been erroneous on the merits, the statement that the Kansas court "did not follow *contrary* Texas precedent" (emphasis added), is simply wrong. See n. 22, *infra*.

[22] The Court provides a list of "putative conflicts" *ante*, at 816–818. The errors and omissions apparent in the Court's discussion demonstrate the dangers of relying on characterizations of state law provided by an interested party.

1. Although there technically may be "no recorded Oklahoma decision dealing with interest liability *for suspended royalties*," *ante*, at 816–817 (emphasis added), Oklahoma law expressly provides that the damages "caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, *with interest thereon*." Okla. Stat., Tit. 23, § 22 (1981) (emphasis added); see also § 6 ("Any person who is entitled to recover damages certain, or capable of being made certain by calculation, . . . is entitled also to recover interest thereon"). The

The crux of my disagreement with the Court is over the standard applied to evaluate the sufficiency of allegations of choice-of-law conflicts necessary to support a constitutional

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Oklahoma Supreme Court has specifically held that oil field royalty owners may sue as a class to recover royalties due them and may recover interest on the amount of recovery. *West Edmond Hunton Line Unit* v. *Young*, 325 P. 2d 1047 (1958).

2. No authority in the Court's string citation regarding Oklahoma's 6% statutory interest rate supports the statement that Oklahoma would "most likely" impose that rate in a suit such as this. *Ante*, at 817. The constitutional and statutory provisions merely provide that "in the absence of any contract" the rate is indeed 6%. Okla. Stat. Ann., Tit. 15, § 266 (1981). The cited judicial decisions merely hold that interest is recoverable on certain obligations, including royalties due to oil field royalty owners, without discussing applicable limitations on the rate.

After examining these Oklahoma authorities, the Kansas Supreme Court found the Oklahoma statutory rate, as well as that of Texas *and Kansas*, inapplicable by its own terms, because here Phillips had contractually agreed to the higher federal rate. 235 Kan., at 220–221, 679 P. 2d, at 1180; 222 Kan., at 563–565, 567 P. 2d, at 1318–1319. No reported Oklahoma decision contradicts this judgment, and the express terms of the Oklahoma statute permit it. See also *McAnally* v. *Ideal Federal Credit Union*, 428 P. 2d 322, 326 (Okla. 1967) (where federal law provides for interest in excess of 12% per year, that rate "must govern" over Oklahoma statutory rate).

3. The Kansas court similarly reviewed Texas' 6% interest statute and found that Phillips' contractual agreement to the FPC rate rendered the statute inapplicable. 235 Kan., at 220, 679 P. 2d, at 1180; 222 Kan., at 563–565, 567 P. 2d, at 1318–1319. It is true that Texas has not awarded suspense royalty interest at a rate higher than 6%—it is equally plain from the cited cases that no higher rate has been sought. Texas courts have, however, specifically permitted recovery at higher rates when a contract, even an implied or oral contract, evidences agreement to such rates. *Preston Farm & Ranch Supply, Inc.* v. *Bio-Zyme Enterprises*, 625 S. W. 2d 295 (Tex. 1981); *Moody* v. *Main Bank of Houston*, 667 S. W. 2d 613 (Tex. App. 1984).

4. While noting Phillips' reliance on an Oklahoma statute stating that "accepting payment of the whole principal, as such, waives all claim to interest," Okla. Stat. Ann., Tit. 23, § 8 (1981), the Court itself demonstrates that this statute's application here is open to question, by citing as "cf." *Webster Drilling Co.* v. *Sterling Oil of Okla., Inc.*, 376 P. 2d 236, 238

claim. Rather than potential, "putative," or even "likely" conflicts, I would require demonstration of an *unambiguous* conflict with the *established* law of another State as an essential element of a constitutional choice-of-law claim. Arguments that a state court has merely applied general common-law principles in a novel manner, or reconciled arguably

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(Okla. 1962). In that case, the Oklahoma Supreme Court held that when a right to interest is "based upon a contract, the interest has become 'a substantive part of the debt itself,'" and Title 23, § 8, "is not applicable." *Id.*, at 238 (citation omitted). The claim to interest upheld in *Webster Drilling* was based on an implied contract, exactly as the Kansas Supreme Court found in *Shutts I*. 222 Kan., at 562, 565, 567 P. 2d, at 1317, 1319. The Kansas Supreme Court explicitly considered Title 23, § 8, and relied on *Webster Drilling* to find it inapplicable. 222 Kan., at 568, 567 P. 2d, at 1321. It is therefore impossible to suggest, as the Court does, that the Kansas court "ignor[ed]" the Oklahoma statute. *Ante*, at 817.

5. Finally, the Court plainly misconstrues Texas law by suggesting that a mere "offer" to pay suspended royalties in return for an indemnity agreement would, by itself, excuse interest. In the federal decision cited by the Court, which mentions no Texas cases at the relevant pages, *Phillips Petroleum Co.* v. *Riverside Gas Co.*, 409 F. Supp., at 495–496, indemnity agreements were *actually entered into*. *Id.*, at 490. The Fifth Circuit case relied on for authority, which *did* cite Texas cases, states that an "*unconditional* offer to give up possession of a disputed fund" is necessary before a bar to interest is created. *Phillips Petroleum Co.* v. *Adams*, 513 F. 2d 355, 370 (1975) (emphasis added). The Texas Supreme Court has subsequently agreed that *Adams* correctly stated Texas law. *Phillips Petroleum Co.* v. *Stahl Petroleum Co.*, 569 S. W. 2d 480, 487 (1978). See also *Fuller* v. *Phillips Petroleum Co.*, 408 F. Supp. 643, 646 (ND Tex. 1976) (entering indemnity agreement terminates interest liability because Phillips "lost the reasonably free use of the money"). No indemnity agreements were entered into by the plaintiffs here, however, and as the Kansas Supreme Court found, Phillips' indemnity offer was not "unconditional"—to the contrary, it was "far more stringent than the corporate undertaking Phillips filed with the FPC." 222 Kan., at 567, 567 P. 2d, at 1320. It is also uncontested that Phillips continued to use freely the unpaid suspense royalties long after its "burdensome" conditions were not accepted by the royalty owners. *Id.*, at 566, 567 P. 2d, at 1320. The Court errs drastically by relying on what one Federal District Court "appears" to have held to sustain a *constitutional* choice-of-law claim.

conflicting laws erroneously in the face of unprecedented factual circumstances should not suffice to make out a constitutional issue.

In this case, the Kansas Supreme Court's application of general principles of equity, its interpretation of the agreements, its reliance on the Commission's regulations,[23] and its construction of general statutory terms contravened no established legal principles of other States and consequently cannot be characterized as either arbitrary or fundamentally unfair to Phillips. I therefore can find no due process violation in the Kansas court's decision.[24]

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[23] The fact that the Kansas court rejected its own State's statute in favor of the uniform federal interest rate, to which it found Phillips had contractually agreed, demonstrates the absence of parochialism from its decision. There is absolutely no indication that Texas or Oklahoma courts would have decided differently had the same claim been presented there.

[24] Neither Phillips nor the Court contends that Kansas cannot constitutionally apply its own laws to the claims of Kansas residents, even though the leased land may lie in other States and no other apparent connection to Kansas may exist. Phillips has done business in Kansas throughout the years relevant to this litigation and it seems unarguable that application of Kansas law, or indeed the law of any of the 50 States where royalty owners reside, to the claims of at least some of the plaintiff class members was thus "perceived as possible" by Phillips "at the time of contracting." *Allstate*, 449 U. S., at 331, n. 24 (STEVENS, J., concurring in judgment); see *id.*, at 316–318, and n. 22. It was also possible, of course, that any number of royalty owners might have moved to Kansas in the years Phillips held their suspense royalties, and that Kansas has a substantial interest in seeing its residents treated fairly when they invoke the jurisdiction of its courts. See Weinberg, Conflicts Cases and the Problem of Relevant Time, 10 Hofstra L. Rev. 1023, 1040–1043 (1982). Because Phillips must have anticipated application of Kansas law to some claims, the eventual geographic distribution of royalty owners' residences goes only to "likelihood" and not to fairness of the application of Kansas law. *Allstate*, 449 U. S., at 331, n. 24 (STEVENS, J., concurring in judgment). Additionally, it is easy enough for national firms like Phillips to make clear their expectations by placing express choice-of-law clauses in their contracts. See *Allstate*, 449 U. S., at 318, n. 24; *id.*, at 324, 328 (STEVENS, J., concurring in judgment); *Clay* v. *Sun Ins. Office, Ltd.*, 377 U. S. 179, 182 (1964). No such clauses are present here, however.

IV

In final analysis, the Court today may merely be expressing its disagreement with the Kansas Supreme Court's statement that in a "nationwide class action . . . the law of the forum should be applied unless compelling reasons exist for applying a different law." 235 Kan., at 221, 679 P. 2d, at 1181. Considering this statement against the background of the Kansas Supreme Court's careful analysis in *Shutts I*, however, I am confident that court would agree that every state court has an obligation under the Full Faith and Credit Clause to "respect the legitimate interests of other States and avoid infringement upon their sovereignty." *Allstate*, 449 U. S., at 322 (STEVENS, J., concurring in judgment); see *Nevada* v. *Hall*, 440 U. S. 410, 421, 424, n. 24 (1979).

It is also agreed that "the fact that a choice-of-law decision may be unsound . . . does not necessarily implicate the federal concerns embodied in the Full Faith and Credit Clause." *Allstate*, 449 U. S., at 323 (STEVENS, J., concurring in judgment); see *ante*, at 823 ("in many situations a state court may be free to apply one of several choices of law"); *Allstate*, 449 U. S., at 307 (plurality opinion). When a suit involves claims connected to States other than the forum State, the Constitution requires only that the relevant laws of other States that are brought to the attention of the forum court be examined fairly prior to making a choice of law.[25] Because this Court "reviews judgments, not opinions," *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984), criticism of a portion of the Kan-

[25] See *Allstate*, 449 U. S., at 326 (STEVENS, J., concurring in judgment) (footnote omitted): "I question whether a judge's decision to apply the law of his own State could ever be described as wholly irrational. For judges are presumably familiar with their own state law and may find it difficult and time consuming to discover and apply correctly the law of another State. The forum State's interest in fair and efficient administration of justice is therefore sufficient, in my judgment, to attach a presumption of validity to a forum State's decision to apply its own law to a dispute over which it has jurisdiction."

sas court's opinion taken out of context provides an insufficient basis for reversing its judgment. Unless the actual *choice* of Kansas law violated substantial constitutional rights of the parties, see 28 U. S. C. § 2111, our power to review judgments of state law—including the state law of choice of law—does not extend to reversal based on disagreement with the law's application. A review of the record and the underlying litigation here convincingly demonstrates that, despite Phillips' protestations regarding Kansas' development of common-law principles, no disregard for the laws of other States nor unfair application of Kansas law to the litigants has occurred.[26] Phillips has no constitutional right to avoid judgment in Kansas because it might have convinced a court in another State to develop its law differently.

I do not believe the Court should engage in detailed evaluations of various States' laws. To the contrary, I believe our limited jurisdiction to review state-court judgments should foreclose such review.[27] Accordingly, I trust that today's

[26] Accord, 3 H. Newberg, Newberg on Class Actions § 13.28, p. 63 (2d ed. 1985) ("the Kansas court in *Shutts II* may have committed only harmless error in applying its own law because there appears to be no significant conflict of laws among the states involved").

[27] The Court's decision in *Allstate* has been criticized on the ground that there may well have been no true conflict of laws present, and, therefore, no need for extended constitutional discussion. See Weintraub, Who's Afraid of Constitutional Limitations on Choice of Law?, 10 Hofstra L. Rev. 17, 18–24 (1981). As I have demonstrated, the Court is once again open to this criticism.

Indeed, unless our review is restricted to cases in which conflicts are unambiguous, the Court will constantly run the risk of misconstruing the common law of any number of States. For example, the Kansas Supreme Court has already decided that Oklahoma would not apply its statutory interest rates where there is evidence of a contractual agreement to a different rate, and that such an agreement is present here. 235 Kan., at 220, 679 P. 2d, at 1180; 222 Kan., at 562–565, 567 P. 2d, at 1318–1319. Yet today the Court speculates that Oklahoma "would most likely apply" its statutory rates in this lawsuit. *Ante*, at 817. Since this Court has no more authority to resolve such issues of Oklahoma law than does the Kansas Supreme Court, however, the latter court remains free to abide by its former judgment.

decision is no more than a momentary aberration, and that the Court's opinion will not be read as a decision to constitutionalize novel state-court developments in the common law whenever a litigant can claim that another State connected to the litigation "most likely" would reach a different result. The Court long ago decided that state-court choices of law are unreviewable here absent demonstration of an unambiguous conflict in the established laws of connected States. See n. 15, *supra*. "To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another State had been construed to his detriment." *Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 496 (1903). Having ignored this admonition today, the Court may be forced to renew its turn-of-the-century efforts to convince the bar that state-court judgments based on fair evaluations of other States' laws are final.

Accordingly, while I join Parts I and II of the Court's opinion, I respectfully dissent from Part III and from the judgment.

JEAN ET AL. *v.* NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 84–5240. Argued March 25, 1985—Decided June 26, 1985

Petitioner named representatives of a class of undocumented and unadmitted aliens from Haiti filed suit in Federal District Court alleging that the change by the Immigration and Naturalization Service (INS) from a policy of general parole for undocumented aliens seeking admission to a policy, based on no statute or regulation, of detention without parole for aliens who could not present a prima facie case for admission was unlawful because it did not comply with the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA). It was further alleged that the restrictive parole policy, as executed by INS officers in the field, violated the equal protection guarantee of the Fifth Amendment because it discriminated against petitioners on the basis of race and national origin. The District Court held for petitioners on the APA claim, but concluded that they had failed to prove discrimination on the basis of race or national origin. The court then enjoined future use of the restrictive parole policy but stayed the injunction to permit the INS to promulgate a new parole policy in compliance with the APA. The INS promptly promulgated a new rule that prohibits the consideration of race or national origin. Ultimately, the Court of Appeals held that the APA claim was moot because the Government was no longer detaining any class members under the invalidated policy, and that the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole. The court then remanded the case to the District Court to permit review of the INS officials' discretion under the new nondiscriminatory rule.

Held: Because the current statutes and regulations provide petitioners with nondiscriminatory parole consideration, there was no need for the Court of Appeals to address the constitutional issue, but it properly remanded the case to the District Court. On remand, the District Court must consider (1) whether INS officials exercised their discretion under the statute to make individualized parole determinations, and (2) whether they exercised this discretion under the statutes and regulations without regard to race or national origin. Such remand protects the class members from the very conduct they fear, and the fact that the protection results from a regulation or statute, rather than from a con-

stitutional holding, is a necessary consequence of the obligation of all federal courts to avoid constitutional adjudication except where necessary. Pp. 853–857.

727 F. 2d 957, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, STEVENS, POWELL, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 858.

Ira J. Kurzban argued the cause for petitioners. With him on the briefs were *Bruce J. Winick*, *Irwin P. Stotzky*, *Christopher Keith Hall*, *Michael J. Rosen*, and *Robert E. Juceam*.

Solicitor General Lee argued the cause for respondents. With him on the briefs were *Acting Assistant Attorney General Willard*, *Deputy Solicitor General Geller*, *Joshua I. Schwartz*, *Barbara L. Herwig*, and *Michael Jay Singer*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Immigration Lawyers Association by *Donald L. Ungar* and *Bill Ong Hing;* for Amnesty International U. S. A. by *Joan Hartman*, *Paul Hoffman*, and *Ralph Steinhardt;* for the Asian American Legal Defense and Education Fund et al. by *Linton Joaquin;* for Metropolitan Dade County et al. by *Robert A. Ginsburg*, *Dianne Saulney Smith*, *Lucia A. Dougherty*, and *Gisella Cardonne;* for the NAACP Legal Defense and Educational Fund, Inc., by *Julius LeVonne Chambers* and *Charles Stephen Ralston;* for the National Association for the Advancement of Colored People et al. by *Robert H. Kapp*, *Roderic V. O. Boggs*, and *Carolyn Waller;* for the National Coalition for Haitian Refugees et al. by *Wade J. Henderson;* for the Procedural Aspects of International Law Institute et al. by *Roberts B. Owen*, *David Carliner*, and *Sarah Wunsch;* and for the Lawyers Committee for International Human Rights et al. by *Arthur C. Helton*, *Harriet Rabb*, *Lucas Guttentag*, *Jeffrey P. Sinensky*, *Ruti G. Teitel*, and *Phil Baum*.

Robert E. Jensen filed a brief for the Federation for American Immigration Reform as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Washington Legal Foundation by *Daniel J. Popeo* and *George C. Smith;* for the American Civil Liberties Union by *Burt Neuborne* and *Charles S. Sims;* and for Aguilar-Ramos et al. by *Dale M. Schwartz* and *David A. Webster*.

JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners, the named representatives of a class of undocumented and unadmitted aliens from Haiti, sued respondent Commissioner of the Immigration and Naturalization Service (INS). They alleged, *inter alia*, that they had been denied parole by INS officials on the basis of race and national origin. See 711 F. 2d 1455 (CA11 1983) (panel opinion) *(Jean I)*. The en banc Eleventh Circuit concluded that any such discrimination concerning parole would not violate the Fifth Amendment to the United States Constitution because of the Government's plenary authority to control the Nation's borders. That court remanded the case to the District Court for consideration of petitioners' claim that their treatment violated INS regulations, which did not authorize consideration of race or national origin in determining whether or not an excludable alien should be paroled. 727 F. 2d 957 (1984) *(Jean II)*. We granted certiorari. 469 U. S. 1071. We conclude that the Court of Appeals should not have reached and decided the parole question on constitutional grounds, but we affirm its judgment remanding the case to the District Court.

Petitioners arrived in this country sometime after May 1981, and represent a part of the recent influx of undocumented excludable aliens who have attempted to migrate from the Caribbean basin to south Florida. Section 235(b) of the Immigration and Nationality Act, 66 Stat. 199, 8 U. S. C. § 1225(b), provides that "[e]very alien . . . who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer." Section 212(d)(5)(A) of the Act, 66 Stat. 188, as amended, 8 U. S. C. § 1182(d)(5)(A), authorizes the Attorney General "in his discretion" to parole into the United States any such alien applying for admission "under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest." The

statute further provides that such parole shall not be regarded as an admission of the alien, and that the alien shall be returned to custody when in the opinion of the Attorney General the purposes of the parole have been served.

For almost 30 years before 1981, the INS had followed a policy of general parole for undocumented aliens arriving on our shores seeking admission to this country. In the late 1970's and early 1980's, however, large numbers of undocumented aliens arrived in south Florida, mostly from Haiti and Cuba. Concerned about this influx of undocumented aliens, the Attorney General in the first half of 1981 ordered the INS to detain without parole any immigrants who could not present a prima facie case for admission. The aliens were to remain in detention pending a decision on their admission or exclusion. This new policy of detention rather than parole was not based on a new statute or regulation. By July 31, 1981, it was fully in operation in south Florida.

Petitioners, incarcerated and denied parole, filed suit in June 1981, seeking a writ of habeas corpus under 28 U. S. C. § 2241 and declaratory and injunctive relief. The amended complaint set forth two claims pertinent here. First, petitioners alleged that the INS's change in policy was unlawfully effected without observance of the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA), 5 U. S. C. § 553. Petitioners also alleged that the restrictive parole policy, as executed by INS officers in the field, violated the equal protection guarantee of the Fifth Amendment because it discriminated against petitioners on the basis of race and national origin. Specifically, petitioners alleged that they were impermissibly denied parole because they were black and Haitian.

The District Court certified the class as "all Haitian aliens who have arrived in the Southern District of Florida on or after May 20, 1981, who are applying for entry into the United States and who are presently in detention pending exclusion proceedings . . . for whom an order of exclusion has

not been entered . . . ." *Louis* v. *Nelson*, 544 F. Supp. 1004, 1005 (SD Fla. 1982). After discovery and a 6-week bench trial the District Court held for petitioners on the APA claim, but concluded that petitioners had failed to prove by a preponderance of the evidence discrimination on the basis of race or national origin in the denial of parole. *Louis* v. *Nelson*, 544 F. Supp. 973 (1982); see also *id.*, at 1004.

The District Court held that because the new policy of detention and restrictive parole was not promulgated in accordance with APA rulemaking procedures, the INS policy under which petitioners were incarcerated was "null and void," and the prior policy of general parole was restored to "full force and effect," 544 F. Supp., at 1006. The District Court ordered the release on parole of all incarcerated class members, about 1,700 in number. See *ibid.* Additionally, the court enjoined the INS from enforcing a rule of detaining unadmitted aliens until the INS complied with the APA rulemaking process, 5 U. S. C. §§ 552, 553.

Under the District Court's order, the INS retained the discretion to detain unadmitted aliens who were deemed a security risk or likely to abscond, or who had serious mental or physical ailments. The court's order also subjected the paroled class members to certain conditions, such as compliance with the law and attendance at required INS proceedings. The court retained jurisdiction over any class member whose parole might be revoked for violating the conditions of parole.

Although all class members were released on parole forthwith, the District Court imposed a 30-day stay upon its order enjoining future use of the INS's policy of incarceration without parole. The purpose of this stay was to permit the INS to promulgate a new parole policy in compliance with the APA. The INS promulgated this new rule promptly. See 8 CFR § 212.5 (1985); 47 Fed. Reg. 30044 (1982), as amended, 47 Fed. Reg. 46494 (1982). Both petitioners and respond-

ents agree that this new rule requires even-handed treatment and prohibits the consideration of race and national origin in the parole decision. Except for the initial 30-day stay, the District Court's injunction against the prior INS policy ended the unwritten INS policy put into place in the first half of 1981. Some 100 to 400 members of the class are currently in detention; most of these have violated the terms of their parole but some may have arrived in this country after the District Court's judgment.[1] It is certain, however, that no class member is being held under the prior INS policy which the District Court invalidated. See *Jean II*, 727 F. 2d, at 962.

After the District Court entered its judgment, respondents appealed the decision on the APA claim and petitioners cross-appealed the decision on the discrimination claim. A panel of the Court of Appeals for the Eleventh Circuit affirmed the District Court's judgment on the APA claim, although on a somewhat different rationale than the District Court. *Jean I*, 711 F. 2d, at 1455. The panel went on to decide the constitutional discrimination issue as well, holding that the Fifth Amendment's equal protection guarantee applied to parole of unadmitted aliens, and the District Court's finding of no invidious discrimination on the basis of race or national origin was clearly erroneous. The panel ordered, *inter alia*, continued parole of the class members, an injunction against discriminatory enforcement of INS parole policies, and any further relief necessary "to ensure that all aliens, regardless of their nationality or origin, are accorded equal treatment." *Id.*, at 1509–1510.

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[1] The record does not inform us of exactly how many class members are in detention, and whether these are postjudgment arrivals or original class members who violated the terms of their parole as set by the District Court. The precise makeup of the class may be addressed on remand. See Tr. of Oral Arg. 42; *Jean II*, 727 F. 2d 957, 962 (1984); Order on Mandate, *Louis* v. *Nelson*, No. 81–1260, p. 1, n. 1 (SD Fla. June 8, 1984); Record, Vol. 17, pp. 4014, 4026, 4035.

The Eleventh Circuit granted a rehearing en banc, thereby vacating the panel opinion. See 11th Cir. Ct. Rule 26(k). After hearing argument, the en banc court held that the APA claim was moot because the Government was no longer detaining any class members under the stricken incarceration and parole policy.[2] All class members who were incarcerated had either violated the terms of their parole or were postjudgment arrivals detained under the regulations adopted after the District Court's order of June 29, 1982. *Jean II*, *supra*, at 962. The en banc court then turned to the constitutional issue and held that the Fifth Amendment did not apply to the consideration of unadmitted aliens for parole. According to the court the grant of discretionary authority to the Attorney General under 8 U. S. C. § 1182(d)(5)(A) permitted the Executive to discriminate on the basis of national origin in making parole decisions.

Although the court in *Jean II* rejected petitioners' constitutional claim, it accorded petitioners relief based upon the current INS parole regulations, see 8 CFR § 212.5 (1985), which are facially neutral and which respondents and petitioners admit require parole decisions to be made without regard to race or national origin. Because no class members were being detained under the policy held invalid by the District Court, the en banc court ordered a remand to the District Court to permit a review of the INS officials' discretion under the nondiscriminatory regulations which were promulgated in 1982 and are in current effect. The court stated:

> "The question that the district court must therefore consider with regard to the remaining Haitian detainees is thus not whether high-level executive branch officials such as the Attorney General have the discretionary authority under the Immigration and Nationality Act

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[2] The APA issue is not before us and we express no view on it. The court in *Jean II* was presented with other issues, none germane to the issues we discuss today.

> (INA) to discriminate between classes of aliens, but whether lower-level INS officials have abused their discretion by discriminating on the basis of national origin in violation of facially neutral instructions from their superiors." *Jean II*, 727 F. 2d, at 963.

The court stated that the statutes and regulations, as well as policy statements of the President and the Attorney General, required INS officials to consider aliens for parole individually, without consideration of race or national origin. Thus on remand the District Court was to ensure that the INS had exercised its broad discretion in an individualized and nondiscriminatory manner. See *id.*, at 978–979.

The court noted that the INS's power to parole or refuse parole, as delegated by Congress in the United States Code, *e. g.*, 8 U. S. C. §§ 1182(d)(5)(A), 1225(b), 1227(a), was quite broad. 727 F. 2d, at 978–979. The court held that this power was subject to review only on a deferential abuse-of-discretion standard. According to the court "immigration officials clearly have the authority to deny parole to unadmitted aliens if they can advance a 'facially legitimate and bona fide reason' for doing so." *Jean II*, *supra*, at 977, citing *Kleindienst* v. *Mandel*, 408 U. S. 753, 770 (1972).

The issue we must resolve is aptly stated by petitioners:

> "This case does not implicate the authority of Congress, the President, or the Attorney General. Rather, it challenges the power of low-level politically unresponsive government officials to act in a manner which is contrary to federal statutes . . . and the directions of the President and the Attorney General, both of whom provided for a policy of non-discriminatory enforcement." Brief for Petitioners 37.

Petitioners urge that low-level INS officials have invidiously discriminated against them, and notwithstanding the new neutral regulations and the statutes, these low-level agents will renew a campaign of discrimination against the

class members on parole and those members who are currently detained. Petitioners contend that the only adequate remedy is "declaratory and injunctive relief" ordered by this Court, based upon the Fifth Amendment. The limited statutory remedy ordered by the court in *Jean II*, petitioners contend, is insufficient. For their part respondents are also eager to have us reach the Fifth Amendment issue. Respondents wish us to hold that the equal protection component of the Fifth Amendment has no bearing on an unadmitted alien's request for parole.

"Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for decision." *Gulf Oil Co.* v. *Bernard*, 452 U. S. 89, 99 (1981); *Mobile* v. *Bolden*, 446 U. S. 55, 60 (1980); *Kolender* v. *Lawson*, 461 U. S. 352, 361, n. 10 (1983), citing *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). This is a "fundamental rule of judicial restraint." *Three Affiliated Tribes of Berthold Reservation* v. *Wold Engineering*, 467 U. S. 138 (1984). Of course, the fact that courts should not decide constitutional issues unnecessarily does not permit a court to press statutory construction "to the point of disingenuous evasion" to avoid a constitutional question. *United States* v. *Locke*, 471 U. S. 84, 96 (1985). As the Court stressed in *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105 (1944), "[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." See also *United States* v. *Gerlach Livestock Co.*, 339 U. S. 725, 737 (1950); *Larson* v. *Valente*, 456 U. S. 228, 257 (1982) (STEVENS, J., concurring).

Had the court in *Jean II* followed this rule, it would have addressed the issue involving the immigration statutes and INS regulations first, instead of after its discussion of the Constitution. Because the current statutes and regulations

provide petitioners with nondiscriminatory parole consideration—which is all they seek to obtain by virtue of their constitutional argument—there was no need to address the constitutional issue.

Congress has delegated its authority over incoming undocumented aliens to the Attorney General through the Immigration and Nationality Act, 8 U. S. C. § 1101 *et seq.* The Act provides that any alien "who [upon arrival in the United States] may not appear to [an INS] examining officer . . . to be clearly and beyond a doubt entitled to land" is to be detained for examination by a special inquiry officer or immigration judge of the INS. 8 U. S. C. §§ 1225(b), 1226(a); see 8 CFR § 236.1 (1985). The alien may request parole pending the decision on his admission. Under 8 U. S. C. § 1182(d)(5)(A),

> "[t]he Attorney General may . . . parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States."

The Attorney General has delegated his parole authority to his INS District Directors under new regulations promulgated after the District Court's order in this case. See 8 CFR § 212.5 (1985). Title 8 CFR § 212.5 provides a lengthy list of neutral criteria which bear on the grant or denial of parole. Respondents concede that the INS's parole discretion under the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin. Respondents' position can best be seen in this colloquy from oral argument:

> "Question: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining

> that the regulations do not constitute any kind of discrimination against these people, and . . . your agents in the field are inhibited by your own regulations from doing what you say the Constitution would permit you to do."
>
> "Solicitor General: That's correct." Tr. of Oral Arg. 28–29.

See also Brief for Respondents 18–19; 8 U. S. C. § 1182(d)(5)(A); 8 CFR § 212.5 (1985); cf. Statement of the President, United States Immigration and Refugee Policy (July 31, 1981), 17 Weekly Comp. of Pres. Doc. 829 (1981). As our dissenting colleagues point out, *post*, at 862–863, the INS has adopted nationality-based criteria in a number of regulations. These criteria are noticeably absent from the parole regulations, a fact consistent with the position of both respondents and petitioners that INS parole decisions must be neutral as to race or national origin.[3]

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[3] We have no quarrel with the dissent's view that the proper reading of important statutes and regulations may not be always left to the stipulation of the parties. But when all parties, including the agency which wrote and enforces the regulations, and the en banc court below, agree that regulations neutral on their face must be applied in a neutral manner, we think that interpretation arrives with some authority in this Court.

The dissent relies upon such cases as *Young* v. *United States*, 315 U. S. 257, 259 (1942), and *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971), even though those cases have faint resemblance to this one. In *Young* the Government confessed error, arguing that the Court of Appeals was wrong in its affirmance of a conviction under a broad reading of the Harrison Anti-Narcotics Act. Because of the importance of a consistent interpretation of criminal statutes, we declined to adopt the Solicitor General's view, and rejected the Circuit Court's interpretation without ourselves considering and deciding the merits of the question. See 315 U. S., at 258–259. *Young* has little bearing on the interpretation of the INS regulations at issue today.

In *Camp* the Solicitor General attempted to defend a banking regulation promulgated by the Comptroller, which was in apparent conflict with federal banking statutes. We rejected the gloss placed upon these statutes by the Solicitor General on appeal; the Comptroller had offered no prelitigation administrative interpretation of these statutes, and the Solicitor

Accordingly, we affirm the en banc court's judgment insofar as it remanded to the District Court for a determination whether the INS officials are observing this limit upon their broad statutory discretion to deny parole to class members in detention. On remand the District Court must consider: (1) whether INS officials exercised their discretion under § 1182(d)(5)(A) to make individualized determinations of parole, and (2) whether INS officials exercised this broad discretion under the statutes and regulations without regard to race or national origin.

Petitioners protest, however, that such a nonconstitutional remedy will permit lower-level INS officials to commence parole revocation and discriminatory parole denial against class members who are currently released on parole. But these officials, while like all others bound by the provisions of the Constitution, are just as surely bound by the provisions of the statute and of the regulations. Respondents concede that the latter do not authorize discrimination on the basis of race and national origin. These class members are therefore protected by the terms of the Court of Appeals' remand from the very conduct which they fear. The fact that the protection results from the terms of a regulation or statute, rather than from a constitutional holding, is a necessary consequence of the obligation of all federal courts to avoid constitutional adjudication except where necessary.

The judgment of the Court of Appeals remanding the case to the District Court for consideration of petitioner's claims based on the statute and regulations is

Affirmed.

General's *post hoc* interpretation could not cure the conflict between the challenged regulation and the statutes.

The interpretation of INS regulations we adopt today involves no *post hoc* rationalizations of agency action. Unlike the Court in *Camp* we do not view the new INS policy or the interpretation of that policy agreed to by all parties and the en banc Court of Appeals to be merely a litigation stance in defense of the agency action which precipitated this litigation.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioners are a class of unadmitted aliens who were detained at various federal facilities pending the disposition of their asylum claims. We granted certiorari to decide whether such aliens may invoke the equal protection guarantees of the Fifth Amendment's Due Process Clause to challenge the Government's failure to release them temporarily on parole. The Court today refuses to address this question, invoking the well-accepted proposition that constitutional issues should be avoided whenever there exist proper nonconstitutional grounds for decision. I, of course, have no quarrel with that proposition. Its application in this case, however, is more than just problematic; by pressing a regulatory construction well beyond "the point of disingenuous evasion," *United States* v. *Locke*, 471 U. S. 84, 96 (1985), the Court thrusts itself into a domain that is properly that of the political branches. Purporting to exercise restraint, the Court creates out of whole cloth nonconstitutional constraints on the Attorney General's discretion to parole aliens into this country, flagrantly violating the maxim that "amendment may not be substituted for construction," *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518 (1926) (Taft, C. J.). In my mind, there is no principled way to avoid reaching the constitutional question presented by the case. Turning to that question, I would hold that petitioners have a Fifth Amendment right to parole decisions free from invidious discrimination based on race or national origin. I respectfully dissent.

I

The Court's decision rests entirely on the premise that the parole regulations promulgated during the course of this litigation preclude INS officials from considering race and national origin in making parole decisions. *Ante*, at 852–853, 855. The Court then reasons that if petitioners can show

disparate treatment based on race or national origin, these regulations would provide them with all the relief that they seek. Thus, it sees no need to address the independent question whether such disparate treatment would also violate the Constitution, and invokes *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring), to avoid deciding that question. If the initial premise were correct, the Court's decision would be sound. But because it is not, the remainder of the Court's opinion simply collapses like a house of cards.

In support of its conclusion, the Court points to no authority other than arguments in the parties' briefs, which in turn cite nothing of relevance. The Court's failure to rely on any other authority is not surprising, for an examination of the regulations themselves, as well as the statutes and administrative practices governing the parole of unadmitted aliens, indicates that there are no nonconstitutional constraints on the Executive's authority to make national-origin distinctions.[1]

A

Congress provided for the temporary parole of unadmitted aliens in § 212(d)(5)(A) of the Immigration and Nationality Act, 66 Stat. 188, as amended, 8 U. S. C. § 1182(d)(5)(A), which states in pertinent part that the Attorney General may "*in his discretion* parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States" (emphasis added). Pursuant to this statute, the INS promulgated regulations in 1958, in which the Attorney Gen-

[1] That the analysis would be different for race discrimination in no way detracts from the force of my argument. Petitioners complain in part about differential treatment based on national origin. Because neither the statute nor the regulations prohibit nationality distinctions, the Court errs in failing to address petitioners' constitutional arguments, at least insofar as they pertain to national-origin discrimination.

eral's discretionary authority was delegated to INS District Directors:

> "The district director in charge of a port of entry may . . . parole into the United States temporarily in accordance with section 212(d)(5) of the act any alien applicant for admission . . . *as such officer shall deem appropriate.*" 23 Fed. Reg. 142 (1958), 8 CFR § 212.5 (1959) (emphasis added).

The quoted portion of the regulations remained unchanged in 1982, at the time of the trial in this case. See 8 CFR § 212.5 (1982).

The District Court found that between 1954 and 1981 most undocumented aliens detained at the border were paroled into the United States. *Louis* v. *Nelson*, 544 F. Supp. 973, 980, n. 18, 990 (SD Fla. 1982); see Brief for Respondents 3. During that period, physical detention was the exception, not the rule, and was "generally employed only as to security risks or those likely to abscond," *Leng May Ma* v. *Barber*, 357 U. S. 185, 190 (1958). See 544 F. Supp., at 990.

As the Court acknowledges, the Government's parole policy became far more restrictive in 1981. See *ante*, at 849. In June 1982, the District Court below enjoined enforcement of this new policy. *Louis* v. *Nelson*, 544 F. Supp. 1004, 1006 (final judgment). The District Court found that the INS had not complied with the Administrative Procedure Act (APA), 5 U. S. C. § 553, as it had not published notice of the proposed change and had not allowed interested persons to comment. See 544 F. Supp., at 997. As a result of the District Court's judgment, the INS promulgated new regulations in July 1982. See 47 Fed. Reg. 30044 (1982); 8 CFR § 212.5 (1982). According to the Court, these regulations, on which this case turns, provide a "lengthy list of neutral criteria which bear on the grant or denial of parole." *Ante*, at 855.

The new parole regulations track the two statutory standards for the granting of parole: "emergent reasons" and "reasons strictly in the public interest." They first provide that "[t]he parole of aliens who have serious medical conditions

in which continued detention would not be appropriate would generally be justified by 'emergent reasons.'" 8 CFR § 212.5(a)(1) (1985). The regulations then define five groups that would "generally come within the category of aliens for whom the granting of the parole exception would be 'strictly in the public interest', provided that the aliens present neither a security risk nor a risk of absconding." § 212.5(a)(2). The first four groups are pregnant women, juveniles, certain aliens who have close relatives in the United States, and aliens who will be witnesses in official proceedings in the United States. §§ 212.5(a)(2)(i)–(iv). The fifth category is a catchall: "aliens whose continued detention is not in the public interest as determined by the district director." § 212.5(a)(2)(v).[2]

Given the catchall provision, the regulations provide somewhat tautologically that it would generally be "strictly in the public interest" to parole aliens whose continued detention is not "in the public interest"; the "lengthy list" of criteria on which the Court relies so heavily is in fact an empty set.[3] Certainly the regulations do not provide either exclusive criteria to guide the "public interest" determination or a list of impermissible criteria. Moreover, they do not, by their terms, prohibit the consideration of race or national origin. As Judge Tjoflat aptly noted in his separate opinion below:

> "The policy in CFR is not a comprehensive policy . . . . It merely sets out a few specific categories of aliens . . . who the district director generally should parole in the absence of countervailing security risks. It leaves the

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[2] The regulations also provide for the parole of aliens who are subject to prosecution in the United States. 8 CFR § 212.5(a)(3) (1985).

[3] To be sure, a District Director cannot parole an alien under 8 CFR § 212.5(a)(2) (1985) unless he determines that the alien "present[s] neither a security risk nor a risk of absconding." This condition, which has been a traditional prerequisite to parole, *Leng May Ma* v. *Barber*, 357 U. S. 185, 190 (1958), merely requires the District Director to make a threshold determination before he exercises his discretion. It is of no aid to the subsequent inquiry of defining the "public interest."

weighing necessary to making parole decisions regarding these categories, *as well as all other parole decisions, purely in the discretion of the district director.* Such a minimal directive is not enough to infer with any certainty that the Attorney General never wants district directors, in making parole decisions, to consider nationality." 727 F. 2d 957, 985–986 (CA11 1984) (concurring in part and dissenting in part) (emphasis added).

B

Nor is a prohibition on the consideration of national origin to be found in the parole statute, pronouncements of the Attorney General and the INS, or the APA, the only other possible nonconstitutional sources for the constraints the Court believes are imposed upon the INS's District Directors. The first potential constraint, of course, is 8 U. S. C. § 1182(d)(5)(A), which vests full "discretion" over parole decisions in the Attorney General. There can be little doubt that at least national-origin distinctions are permissible under the parole statute if they are consistent with the Constitution. First, the grant of discretionary authority to the Attorney General over immigration matters is extremely broad. See 2 K. Davis, Administrative Law Treatise § 8:10 (2d ed. 1979); 2 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 8.14 (1985). For example, in *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72 (1957), this Court held that, where Congress does not specify the standards that are to guide the Attorney General's exercise of discretion in the immigration field, the Attorney General can rely on any reasonable factors of his own choosing. *Id.*, at 78.

Moreover, with respect to other immigration matters in which Congress has vested similar discretion in the Attorney General, the INS, acting pursuant to authority delegated by the Attorney General, has specifically adopted nationality-based criteria. See, *e. g.*, 8 CFR § 101.1 (1985) (presumption of lawful admission for certain national groups); § 212.1 (documentary requirements for nonimmigrants of particular

nationalities); § 231 (arrival-departure manifests for passengers from particular countries); § 242.2(e) (nationals of certain countries entitled to special privilege of communication with diplomatic officers); § 252.1 (relaxation of inspection requirements for certain British and Canadian crewmen). These regulations indicate that the INS believes that nationality-based distinctions are not necessarily inconsistent with congressional delegation of "discretion" over immigration decisions to the Executive. That interpretation of the statutes is, of course, entitled to deference. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 844–845 (1984).

My conclusion that the parole statute leaves room for nationality-based distinctions is consistent with the Government's position before the en banc Court of Appeals. The brief filed by Assistant Attorney General McGrath in that court explicitly stated that "the Executive is not precluded from drawing nationality-based distinctions, for Congress has delegated the full breadth of its parole and detention authority to the Attorney General." En Banc Brief of Alan C. Nelson in No. 82–5772 (CA11 1983), p. 18. In maintaining that the parole statute does not proscribe differential treatment based on national origin, the Government added:

> "Congress knows how to prohibit nationality-based distinctions when it wants to do so. In the absence of such an express prohibition, it should be presumed that the broad delegation of authority encompasses the power to make nationality-based distinctions." *Id.*, at 11.

The conclusion that Congress did not provide the constraint identified by the Court does not end the inquiry, as the Attorney General could have narrowed the discretion that the regulations vest in the District Directors. For example, he could have published interpretive rules, staff instructions, or policy statements making clear that this discretion did not extend to race or national-origin distinctions. But throughout this litigation, the Government has pointed

to absolutely no evidence that the Attorney General in fact chose to narrow the discretion of District Directors in this manner. Moreover, neither the INS's Operations Instructions nor its Examinations Handbook, which provide guidance to INS officers in the field, indicate that race and national origin cannot be taken into account in making parole decisions.

The final possible constraint comes from the APA's requirement that administrative action not be arbitrary, capricious, or an abuse of discretion, 5 U. S. C. § 706(2)(A). See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U. S. 402, 411 (1971); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140–141 (1967). For better or worse, however, nationality classifications have played an important role in our immigration policy. There is thus no merit to the argument that it is arbitrary, capricious, or an abuse of discretion for a District Director to take nationality into account in making parole decisions under 8 CFR § 212.5 (1985). See also *supra*, at 862 (discussing Attorney General's discretion). In summary, the Court's conclusion that, aside from constitutional constraints, the parole regulations prohibit national-origin distinctions draws no support from anything in the regulations themselves or in the statutory and administrative background to those regulations.

C

The Court's view that the regulations are neutral with respect to race and national origin is based only on the representations of the Solicitor General and the purported agreement of the parties.[4] On the first point, the Court states: "Respondents concede that the INS's parole discretion under

[4] The Court also appears to share the Court of Appeals' misconception that the new regulations somehow changed the substantive standards for parole. By the INS's own admission, however, those regulations merely "sought to codify existing Service practices." See 47 Fed. Reg. 46494 (1982).

the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin." *Ante*, at 855. Such reliance on the Solicitor General's interpretation of agency regulations is misplaced.

An agency's reasonable interpretation of the statute it is empowered to administer is entitled to deference from the courts, and will be set aside only if it is inconsistent with the clear intent of Congress. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, *supra*, at 844. Similarly, an agency's interpretation of its own regulations is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945); see *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 566 (1980); *United States* v. *Larionoff*, 431 U. S. 864, 872 (1977). These presumptions do not apply, however, to representations of appellate counsel. As we stated in *Investment Company Institute* v. *Camp*, 401 U. S. 617 (1971): "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possess the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Id.*, at 628; see *Motor Vehicle Mfrs. Assn.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 50 (1983); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 168–169 (1962). The same considerations apply, of course, to appellate counsel's interpretation of regulations.

The Solicitor General's representations to this Court are not supported by citation to any authoritative statement by the Attorney General or the INS to the effect that the statute and regulations prohibit distinctions based on race or national origin. See Brief for Respondents 18–19. Indeed, "except for some too-late formulations, apparently coming from the Solicitor General's office," *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, at 422 (opinion of Black, J.), we have been directed to no relevant indication that the administrative

practice was to prohibit such distinctions.[5] See *supra*, at 862–863. The Solicitor General's contention to the contrary is merely an unsupported assertion by counsel for a litigant; this Court owes it no deference at all.[6]

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[5] The Court's conclusion that the Solicitor General's statements are not mere "*post hoc* rationalizations for agency action," *ante*, at 857, n. 3, is untenable. Before this Court, the Solicitor General argues that the INS is precluded by the statute and regulations from making nationality-based distinctions. At trial, however, the Government argued the opposite, namely, that "nationality may well be a factor that leads to parole." Record, Vol. 47, p. 1858. Because the substantive criteria for parole have not changed during the course of this litigation, see n. 4, *supra*, the Solicitor General's representations are flatly inconsistent with the Government's own position at trial; they reflect nothing but a change in the Government's litigation strategy. This is precisely the sort of *post hoc* rationalization that is entitled to no weight. See *Motor Vehicle Mfrs. Assn.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U. S. 29, 50 (1983).

[6] At trial, one Government witness, Associate Attorney General Giuliani, stated that "if the statute is being applied discriminatorily, it is being applied in violation of the policies of the Attorney General." Record, Vol. 49, p. 2343. This witness, however, did not indicate what he meant by "discrimination," and did not point to any specific "policies." To the extent that he was referring to distinctions based on national origin, his statement was inconsistent with the Government's own theory. See n. 5, *supra*.

Moreover, the District Court found "inconsistencies between what the Government witnesses said the policy was and the policy their subordinates were carrying out," as a result of "the absence of guidelines for detention and parole." *Louis* v. *Nelson*, 544 F. Supp. 973, 981, n. 24 (SD Fla. 1982). Similarly, the panel of the Court of Appeals properly found that Associate Attorney General Giuliani's testimony contradicted the testimony of INS Commissioner Alan C. Nelson, one of the respondents in this case, as well as statements by former INS Commissioner Doris Meissner. 711 F. 2d 1455, 1471 (CA11 1983). The unsupported, uncredited, and contradicted assertions of one Government witness are of course insufficient to establish the existence of an administrative practice. Not surprisingly, the Government does not direct this Court's attention to that testimony.

Finally, the Government's position at trial that it had not in fact treated Haitians differently from other detained aliens sheds no light on the entirely separate question of whether different treatment would have been inconsistent with the statutes and regulations.

The Court also relies on the purported agreement between petitioners and the Solicitor General that the regulations require parole decisions to be made without regard to race or national origin. *Ante*, at 852. First, I do not read petitioners' arguments as the Court does. In my mind, the main thrust of the relevant portion of petitioners' brief is that the regulations in question set out neutral criteria for parole. See Brief for Petitioners 7–10, 30, 37, 38. Unless such criteria are exclusive, however, they are not necessarily inconsistent with distinctions based on race or national origin. Certainly no plausible argument can be made that the criteria of 8 CFR § 212.5(a) (1985) were intended to be exclusive. See *supra*, at 861.

More importantly, this Court's judgments are precedents binding on the lower courts. Thus, the proper interpretation of an important federal statute and regulations, such as are at issue here, cannot be left merely to the stipulation of parties. See *Young* v. *United States*, 315 U. S. 257, 259 (1942); see also *Sibron* v. *New York*, 392 U. S. 40, 59 (1968). The Court's construction of the administrative policy in this case will have implications far beyond the confines of this litigation.[7]

In fact, the Court's decision casts serious doubt on the validity of numerous immigration policies. As I have already mentioned, many statutes in the immigration field vest "discretion" in the Attorney General. The Court's restrictive view of the Attorney General's discretionary authority with respect to parole decisions, adopted in the face of no authoritative statements limiting such discretion, will presumably affect the scope of his permissible discretion in areas other than parole decisions. Moreover, because the Court does not explain what in the language or policy underlying any relevant statute, regulation, or administrative practice, lim-

[7] In addition, the Court cites the President's Statement on United States Immigration and Refugee Policy (17 Weekly Comp. of Pres. Doc. 829 (1981)). Nothing in that Statement is relevant to the question whether national-origin distinctions are consistent with the statute and regulations.

its the Attorney General's discretion only with respect to the consideration of race and national origin, its opinion can be read to preclude the Attorney General from making distinctions based on other factors as well. Such a result is inconsistent with well-established precedents of immigration law and threatens to constrain severely the Executive's ability to address our Nation's pressing immigration problems. This is indeed a costly way to avoid deciding constitutional issues. See *supra*, at 858.

II

Having shown that the Court's interpretation of the regulations is untenable, I turn to consider the constitutional question presented by this case: May the Government discriminate on the basis of race or national origin in its decision whether to parole unadmitted aliens pending the determination of their admissibility? The en banc Court of Appeals rejected petitioners' constitutional claim, holding that *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (1953), compels the conclusion that petitioners "cannot claim equal protection rights under the fifth amendment, even with regard to challenging the Executive's exercise of its parole discretion." 727 F. 2d, at 970.[8] Before this Court, the Government takes the same position, arguing that "*Mezei* is directly on point." Brief for Respondents 40. I agree that broad dicta in *Mezei* might suggest that an undocumented alien detained at the border does not enjoy *any* constitutional

[8] The Court of Appeals acknowledged that its holding was squarely at odds with the holding of the Court of Appeals for the Tenth Circuit in *Rodriguez-Fernandez* v. *Wilkinson*, 654 F. 2d 1382 (1981). See 727 F. 2d, at 974–975. Moreover, the Court of Appeals for the Second Circuit has suggested that unadmitted aliens can invoke the protections of the Constitution. See *Augustin* v. *Sava*, 735 F. 2d 32, 37 (1984) ("it appears likely that some due process protection surrounds the determination of whether an alien has sufficiently shown that return to a particular country will jeopardize his life or freedom"); *Yiu Sing Chun* v. *Sava*, 708 F. 2d 869, 877 (1983) (a refugee's "interest in not being returned may well enjoy some due process protection").

protections, and therefore cannot invoke the equal protection guarantees of the Fifth Amendment's Due Process Clause. See also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 544 (1950); *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 601 (1953). This broad dicta, however, can withstand neither the weight of logic nor that of principle, and has never been incorporated into the fabric of our constitutional jurisprudence. Moreover, when stripped of its dicta, *Mezei* stands for a narrow proposition that is inapposite to the case now before the Court.

A

Ignatz Mezei arrived in New York in 1950 and was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act. Pending disposition of his application for admission, he was detained at Ellis Island. A few months after his arrival and initial detention, the Attorney General entered a permanent order of exclusion, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest . . . for security reasons." 345 U. S., at 208. Mezei was not told what this information was and was given no opportunity to present evidence of his own.

Mezei then began a year-long search for a country willing to accept him. All of his attempts to find a new home failed, however, as did the State Department's efforts on his behalf. As a result, Mezei "sat on Ellis Island because this country shut him out and others were unwilling to take him in." *Id.*, at 209.

Seeking a writ of habeas corpus, Mezei argued that the Government's refusal to inform him of the reasons for his continued detention violated due process. *United States ex rel. Mezei* v. *Shaughnessy*, 101 F. Supp. 66, 68 (SDNY 1951). The District Court ordered the Government to disclose those reasons but gave it the option of doing so *in camera*. After the Government refused to comply altogether, the District Court directed Mezei's conditional parole on

bond. A divided panel of the Court of Appeals for the Second Circuit affirmed the parole order but, in a 5–4 decision, this Court reversed.

The Court first distinguished between aliens who have entered the United States, whether legally or illegally, and those who, like Mezei and petitioners here, are detained at the border as they attempt to enter. The former group, the Court reasoned, could be expelled "only after proceedings conforming to traditional standards of fairness encompassed in due process of law." 345 U. S., at 212. The Court, however, refused to afford such protections to the latter group. Citing *United States ex rel. Knauff* v. *Shaughnessy*, *supra*, the Court stated: "'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'" 345 U. S., at 212 (quoting 338 U. S., at 544).

In *Knauff*, a 4–3 decision, an alien married to a United States citizen had sought to enter the United States to be naturalized. Upon arrival at our border, she was detained at Ellis Island. Eventually, and without a hearing, she was permanently excluded from the United States on the basis of undisclosed confidential information. The Court refused to find a constitutional right to a hearing prior to exclusion, stating that "it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien." *United States ex rel. Knauff* v. *Shaughnessy*, *supra*, at 543. Even though the procedural challenge in *Mezei* was not related to an exclusion order, but instead to the Government's refusal to temporarily parole an alien who already had been deemed excludable, the Court in *Mezei* did not distinguish between the two situations. Instead, it followed *Knauff* as if it were directly on point.

Justices Black, Frankfurter, Douglas, and Jackson dissented in *Mezei*. Focusing on Mezei's detention on Ellis Island, Justice Jackson asked: "Because the respondent has no right of entry, does it follow that he has no rights at

all?" 345 U. S., at 226 (Jackson, J., joined by Frankfurter, J., dissenting). He concluded that this detention could be enforced only through procedures "which meet the test of due process of law." *Id.*, at 227. Similarly, Justice Black stated that "individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts." *Id.*, at 218 (Black, J., joined by Douglas, J., dissenting). He too thought that "Mezei's continued imprisonment without a hearing violate[d] due process of law." *Id.*, at 217.

The statement in *Knauff* and *Mezei* that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned," lies at the heart of the Government's argument in this case. This language suggests that aliens detained at the border can claim no rights under the Constitution. Further support for that view comes from *Kwong Hai Chew* v. *Colding*, *supra*, which was decided after *Knauff* but one month before *Mezei*. The alien in *Chew* was a permanent resident of the United States who was "excluded" upon his return to this country following a 5-month trip abroad as a crewman on an American merchant ship. The Court declined to follow *Knauff*, which, it stated, "relates to the rights of an alien entrant and does not deal with the question of a resident alien's right to be heard." *Kwong Hai Chew* v. *Colding*, 344 U. S., at 596. The Court then stated that a resident alien, unlike an alien entrant, "is a person within the protection of the Fifth Amendment." *Ibid.* Focusing on Chew's hybrid status—that of a resident alien attempting to enter the United States—the Court said:

> "While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. *His status as a person within the*

meaning and protection of the Fifth Amendment cannot be capriciously taken from him." Id., at 601 (emphasis added).

In the Court's view, because he was a resident alien, Chew was a "person" for the purposes of the Fifth Amendment. Also under the Court's view, however, the Executive's characterization of Chew as a first-time entrant—rather than a resident alien—was equivalent to taking away his status as a "person" for the purposes of constitutional coverage.

The broad and ominous nature of the dicta in *Knauff*, *Chew*, and *Mezei* becomes clear when one realizes that they apply not only to aliens outside our borders, but also to aliens who are physically within the territory of the United States and over whom the Executive directly exercises its coercive power. Moreover, the dicta do not apply only to aliens in detention at modern-day Ellis Islands; they apply also to individuals who literally live within our midst, as our case law establishes that aliens temporarily paroled into the United States have no more rights than those in detention. See *Kaplan* v. *Tod*, 267 U. S. 228 (1925).

B

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 6 Wheat. 264, 399 (1821) (Marshall, C. J.). The narrow question decided in *Knauff* and *Mezei* was that the denial of a hearing in a case in which the Government raised national security concerns did not violate due process. See also *infra*, at 877. The question decided in *Chew* was that the alien's due process rights *had* been violated. The broad notion that "'excludable' aliens . . . are not within the protection of the Fifth

Amendment," *Kwong Hai Chew* v. *Colding*, *supra*, at 600, on which the Government heavily relies in this case, Brief for Respondents 28–29, is therefore clearly dictum, and as such it is entitled to no more deference than logic and principle would accord it. Under this standard, the broad dictum in question deserves no deference at all.

Our case law makes clear that excludable aliens do, in fact, enjoy Fifth Amendment protections. First, when an alien detained at the border is criminally prosecuted in this country, he must enjoy at trial all of the protections that the Constitution provides to criminal defendants. As early as *Wong Wing* v. *United States*, 163 U. S. 228 (1896), the Court stated, albeit in dictum, that while Congress can "forbid aliens or classes of aliens from coming within [our] borders," it cannot punish such aliens without "a judicial trial to establish the guilt of the accused." *Id.*, at 237. The right of an unadmitted alien to Fifth Amendment due process protections at trial is universally respected by the lower federal courts and is acknowledged by the Government. See, *e. g.*, *United States* v. *Henry*, 604 F. 2d 908, 912–913 (CA5 1979); *United States* v. *Casimiro-Benitez*, 533 F. 2d 1121 (CA9), cert. denied, 429 U. S. 926 (1976); Brief in Opposition 20–21. Surely it would defy logic to say that a precondition for the applicability of the Constitution is an allegation that an alien committed a crime. There is no basis for conferring constitutional rights only on those unadmitted aliens who violate our society's norms.

Second, in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931), the Court held that a corporation "duly organized under, and by virtue of, the Laws of Russia," *id.*, at 487, could invoke the Fifth Amendment to challenge an unlawful taking by the Federal Government. The corporation in that case certainly had no more claim to being "within the United States" than do the aliens detained at Ellis Island. Nonetheless, the Court broadly stated that *"[a]s alien friends are embraced within the terms of the Fifth*

Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country." *Id.*, at 491–492 (emphasis added). Under the dicta in the *Knauff-Chew-Mezei* trilogy, however, an alien could not invoke the Constitution to challenge the conditions of his detention at Ellis Island or at a similar facility in the United States. It simply is irrational to maintain that the Constitution protects an alien from deprivations of "property" but not from deprivations of "life" or "liberty." Such a distinction is rightfully foreign to the Fifth Amendment.

Third, even in the immigration context, the principle that unadmitted aliens have no constitutionally protected rights defies rationality. Under this view, the Attorney General, for example, could invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens. He might argue that scarce immigration resources could be better spent by hiring additional agents to patrol our borders than by providing food for detainees. Surely we would not condone mass starvation. As Justice Jackson stated in his dissent in *Mezei*:

> "Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities? It would effectuate [an alien's] exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law?" 345 U. S., at 226–227.

Only the most perverse reading of the Constitution would deny detained aliens the right to bring constitutional challenges to the most basic conditions of their confinement.

Fourth, any limitations on the applicability of the Constitution within our territorial jurisdiction fly in the face of this Court's long-held and recently reaffirmed commitment

to apply the Constitution's due process and equal protection guarantees to all individuals within the reach of our sovereignty. "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369 (1886). Indeed, by its express terms, the Fourteenth Amendment prescribes that "[n]o State . . . shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In *Plyler* v. *Doe*, 457 U. S. 202 (1982), we made clear that this principle applies to aliens, for "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term." *Id.*, at 210; see also *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976). Such emphasis on universal coverage is not surprising, given that the Fourteenth Amendment was specifically intended to overrule a legal fiction similar to that undergirding *Knauff*, *Chew*, and *Mezei*—that freed slaves were not "people of the United States." *Scott* v. *Sandford*, 19 How. 393, 404 (1857).

Therefore, it cannot rationally be argued that the Constitution provides no protections to aliens in petitioners' position. Both our case law and pure logic compel the rejection of the sweeping proposition articulated in the *Knauff-Chew-Mezei* dicta. To the extent that this Court has relied on *Mezei* at all, it has done so only in the narrow area of entry decisions. See, *e. g.*, *Landon* v. *Plasencia*, 459 U. S. 21, 32 (1982); *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972). It is in this area that the Government's interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling. But even with respect to entry decisions, the Court has refused to characterize the authority of the political branches as wholly unbridled. Indeed, "[o]ur cases reflect acceptance of a limited judicial responsibility under the Constitution even with

respect to the power of Congress to regulate the admission and exclusion of aliens." *Fiallo* v. *Bell*, 430 U. S. 787, 793, n. 5 (1977).[9]

Regardless of the proper treatment of constitutional challenges to entry decisions, unadmitted aliens clearly enjoy constitutional protections with respect to other exercises of the Government's coercive power within our territory. Of course, this does not mean that the Constitution requires that the rights of unadmitted aliens be coextensive with those of citizens. But, "[g]ranting that the requirements of due process must vary with the circumstances," the Court is obliged to determine whether decisions concerning the parole of unadmitted aliens are consistent with due process, and it cannot "pass back the buck to an assertedly all-powerful and unimpeachable Congress." Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1394 (1953) (discussing *Knauff* and *Mezei*). The proper constitutional inquiry must concern the scope of the equal protection and due process

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[9] Even in the 1950's, *Mezei* was heavily criticized by academic commentators. See, *e. g.*, Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1392–1396 (1953) (describing the rationale behind *Mezei* as "a patently preposterous proposition"); 1 K. Davis, Administrative Law Treatise § 7.15, pp. 479–482 (1958); see also 2 K. Davis, Administrative Law Treatise § 11:5, p. 358 (2d ed. 1979) ("The holding that a human being may be incarcerated for life without opportunity to be heard on charges he denies is widely considered to be one of the most shocking decisions the Court has ever rendered"); Martin, Due Process and the Treatment of Aliens, 44 U. Pitt. L. Rev. 165, 176 (1983) (describing *Mezei* as "a rather scandalous doctrine, deserving to be distinguished, limited, or ignored"); Schuck, The Transformation of Immigration Law, 84 Colum. L. Rev. 1, 20 (1984) ("[among] the most deplorable governmental conduct toward both aliens and American citizens ever recorded in the annals of the Supreme Court"); Developments in the Law—Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1322–1324 (1983); Note, Constitutional Limits on the Power to Exclude Aliens, 82 Colum. L. Rev. 957 (1982).

rights at stake, and not whether the Due Process Clause can be invoked at all.

C

The Government argues, however, that the parole decision at issue here is no different from an entry decision, and it maintains that the holding of the Court of Appeals is compelled not only by the broad dicta in *Mezei* but also by *Mezei*'s actual holding. In support of this position, the Government seizes on one phrase in *Mezei*—that to temporarily admit an alien "nullifies the very purpose of the exclusion proceeding." 345 U. S., at 216. It is simply untenable to weave a broad principle out of the anomalous facts of *Mezei*.

The most obvious—and controlling—difference between the two cases is that the alien in *Mezei* had already been excluded on security grounds when he sought parole. Under the circumstances, parole would have had the same pernicious effects that the order of exclusion was designed to protect against. Indeed, to the extent that Mezei's presence in this country was a threat to our national security, the threat flowing from his temporary parole was as serious as that resulting from his admission. Activities such as espionage and sabotage can accomplish their objectives quickly; it does not necessarily take years to steal sensitive materials or blow up strategic buildings. Under the idiosyncratic facts of *Mezei*, it was reasonable that the alien's rights with respect to admission and parole were deemed coextensive.

In contrast, the petitioners in this case have not been excluded from the United States. In fact, the reason that they are still in this country is that the Government has not yet performed its statutory duty to evaluate their applications for admission. More importantly, there is no argument here that security questions are at stake, and there is no reason to believe that petitioners' parole would "nullify the purpose" of their potential exclusion in some other way. As a matter of course, we admit tourists, students, and other short-term

visitors whom we would not want to have permanently in our midst. Whatever immigration goals might be compromised by actually admitting petitioners would not necessarily be compromised similarly by paroling them pending the determination of their admissibility. Here, unlike in *Mezei*, parole and admission cannot be evaluated by the same yardstick.

This case is different from *Mezei* in other important ways. One such distinction is well captured in the Government's brief in *Mezei:*

> "[I]f the court below is correct in determining that an alien who can find no country to give him refuge is entitled at least to temporary admittance here, it follows that the more undesirable an alien is, the better are his chances of admission, since the less likely he is to find other countries willing to accept him. In fact, if he is undesirable enough, he may attain what amounts to permanent residence in this country since no other nation will ever take him in." Brief for Petitioner in No. 52–139, O. T. 1952, p. 19.

Through parole, *Mezei* could have gained the same important substantive immigration rights that he already had been denied when he was excluded. In contrast, petitioners here could gain no such rights. Their parole could be terminated at any time at the discretion of the Attorney General, and their admissibility would then be determined at exclusion proceedings just as if they had never been paroled. See 8 U. S. C. § 1182(d)(5)(A); *Leng May Ma* v. *Barber*, 357 U. S., at 188; *Kaplan* v. *Tod*, 267 U. S., at 230; 1 C. Gordon & H. Rosenfield, Immigration Law and Procedure § 2.54, p. 2–374 (1985). Whereas parole will never give petitioners a "foothold in the United States," *Kaplan* v. *Tod*, *supra*, at 230, it might have made it possible for Mezei to stay here indefinitely.

Moreover, Mezei's incentives to look for a country willing to take him would have disappeared had he been released

from Ellis Island and allowed to return to his wife and home in Buffalo, N. Y. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S., at 217 (Black, J., dissenting). In this case, the same incentives are simply not present.

Turning from substance to procedure, I find that the Court's refusal to accord Mezei the procedural due process rights that he sought—namely, to know what information the Government had relied upon—had less to do with Mezei's status as an alien than with the Court's willingness to defer to the Executive on national security matters in the midst of the Cold War. Indeed, in *Jay* v. *Boyd*, 351 U. S. 345 (1956), the Court upheld the Govenment's use of similar confidential information in a deportation proceeding. Even though the Court recognized that "a resident alien in a deportation proceeding has constitutional protections unavailable to a nonresident alien seeking entry into the United States," *id.*, at 359, it nonetheless relied on *Knauff* and *Mezei* to dismiss the alien's claim, 351 U. S., at 358–359. In doing so, it noted that the constitutionality of the Government's practice gave it "no difficulty." *Id.*, at 357, n. 21. In *Jay*, the Court viewed *Knauff* and *Mezei* as national security cases and not as cases involving aliens attempting to enter the United States. In this case, in contrast, no national security considerations are said to be at stake.

Finally, whatever *Mezei* may have held about procedural due process rights in connection with parole requests is not applicable to the separate constitutional question whether the Government may establish a policy of making parole decisions on the basis of race or national origin without articulating any justification for its discriminatory conduct. As far back as *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Court recognized that even decisions over which the Executive has broad discretion, and which the Executive may make without providing notice or a hearing, cannot be made in an invidiously discriminatory manner. Under the statute that the Court reviewed in *Yick Wo*, the State did not have to give reasons for its decision to prosecute violators of an ordinance

making it illegal under most circumstances to maintain a laundry without consent of the board of supervisors. Yet the Court held that the ordinance could not be applied selectively in a manner that discriminated against Chinese-Americans. Finding that the law was "applied and administered by a public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances," the Court reversed the convictions of those who had violated the ordinance. *Id.*, at 373–374. More recently, in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U. S. 274 (1977), we stated that an employee who "could have been discharged for no reason whatever, and had no constitutional right to . . . the decision not to rehire him, [could] nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms." *Id.*, at 283–284 (citation omitted); see also *Heckler* v. *Chaney*, 470 U. S. 821, 838 (1985). Thus, the Attorney General's broad discretion in the immigration area is not a license to engage in invidious discrimination.

D

This dissent is not the place to determine the precise contours of petitioners' equal protection rights, but a brief discussion might clarify what is at stake. It is clear that, consistent with our constitutional scheme, the Executive enjoys wide discretion over immigration decisions. Here, the Government would have a strong case if it showed that (1) refusing to parole Haitians would slow down the flow onto United States shores of undocumented Haitians, and that (2) refusing to parole other groups would not have a similar deterrent effect. Then, its policy of detaining Haitians but paroling other groups might be sufficiently related to the valid immigration goal of reducing the number of undocumented aliens arriving at our borders to withstand constitu-

tional scrutiny. Another legitimate governmental goal in this area might be to reduce the time it takes to process applications for asylum. If the challenged policy serves that goal, then arguably it should be upheld, provided of course that it is not too underinclusive.

It is also true that national origin can sometimes be a permissible consideration in immigration policy. But even if entry quotas may be set by reference to nationality, national origin (let alone race) cannot control every decision in any way related to immigration. For example, that the Executive might properly admit into this country many Cubans but relatively few Haitians does not imply that, when dealing with aliens in detention, it can feed Cubans but not feed Haitians.

In general, national-origin classifications have a stronger claim to constitutionality when they are employed in connection with decisions that lie at the heart of immigration policy. Cf. *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 116 (1976) ("[D]ue process requires that [an agency's] decision to impose [a] deprivation of an important liberty . . . be justified by reasons which are properly the concern of that agency"). When central immigration concerns are not at stake, however, the Executive must recognize the individuality of the alien, just as it must recognize the individuality of all other persons within our borders. If in this case the Government acted out of a belief that Haitians (or Negroes for that matter) are more likely than others to commit crimes or be disruptive of the community into which they are paroled, its detention policy certainly would not pass constitutional muster.

III

The narrow question presented by this case is whether, in deciding which aliens will be paroled into the United States pending the determination of their admissibility, the Government may discriminate on the basis of race and national

origin even in the absence of any reasons closely related to immigration concerns. To my mind, the Constitution clearly provides that it may not. I would therefore reverse the judgment of the Court of Appeals and remand for a determination of the scope of petitioners' equal protection rights.

The Court instead disposes of this case through reliance on a statutory and regulatory analysis that finds no support in either the statute or the regulations. I therefore dissent.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 882 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM JUNE 4 THROUGH JUNE 25, 1985

JUNE 4, 1985

Dismissal Under Rule 53

No. 84–248. PINO *v.* DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT'S CHILDREN'S COURT IN AND FOR THE COUNTY OF BERNALILLO. Sup. Ct. N. M. [Probable jurisdiction postponed, 471 U. S. 1014.] Appeal dismissed under this Court's Rule 53.

JUNE 10, 1985

Appeals Dismissed

No. 83–1952. PAN AMERICAN WORLD AIRWAYS, INC. *v.* PUCHERT ET AL. Appeal from Sup. Ct. Haw. dismissed for want of substantial federal question. Reported below: 67 Haw. 225, 677 P. 2d 449.

No. 84–1248. VILLAGE PUBLISHING CORP. *v.* NORTH CAROLINA DEPARTMENT OF REVENUE. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 312 N. C. 211, 322 S. E. 2d 155.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

The North Carolina Sales and Use Tax Act, N. C. Gen. Stat. §§ 105–164.1 to 105–164.44A (1979 and Supp. 1983), exempts "[s]ales of newspapers by newspaper street vendors and by newspaper carriers making door–to–door deliveries and sales of magazines by magazine vendors making door–to–door sales." § 105–164.13(28). The provision offers newspapers using this means of delivery a tax benefit denied other members of the press. A publisher distributing a newspaper free of charge must pay a sales or use tax on personal property that it purchases and incorporates into its newspaper (or on purchases of the printed newspaper itself if it is purchased in completed form from the printer), for such property is "not sold but used, consumed, distributed, or stored for consumption" in North Carolina. § 105.164.6(1). A publisher selling a newspaper at retail other than through street vendors or paper-

boys escapes sales or use taxation on personal property that goes into the production of the newspaper, for that property is resold, see § 105–164.13(8); however, a sales tax must be paid on the final retail sale of such a newspaper. A newspaper that is sold through street vendors or newsboys escapes both forms of taxation: the publisher's purchase of personal property that goes into its final product is exempt, as such property is resold, and its retail sales are also exempt under § 105–164.13(28).

In this case, the Supreme Court of North Carolina held that this tax scheme, as applied to newspapers ineligible for the exemption, neither abridged the freedom of the press nor violated the Equal Protection Clause. The court pointed out that the North Carolina sales and use tax scheme did not single out the press for special treatment, but applied to retail sales generally. *In re Assessment of Taxes Against Village Pub. Corp.*, 312 N. C. 211, 322 S. E. 2d 155 (1984). Thus, it was free from one of the primary defects of the tax struck down by this Court in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575 (1983). That the statute contained an exemption for newspapers sold through street vendors and newsboys did not make it invalid: such an exemption required only a rational basis. The court found such a rational basis in the difficulty of requiring street vendors and newsboys—many of them children—to collect the sales tax. This difficulty, not present when a paper was sold through other means or given away free, justified the special exemption.

This case is within our mandatory appellate jurisdiction under 28 U. S. C. § 1257(2). Appellant argues that the North Carolina tax scheme, by singling out one segment of the press for a special exemption from taxation, violates the First Amendment and the Equal Protection Clause. In summarily dismissing the appeal, the Court today holds these arguments "insubstantial." In view of *Minneapolis Star*, *supra*, I cannot agree.

The statute at issue in *Minneapolis Star* not only singled out the press for special treatment, but also drew distinctions among members of the press, subjecting some to a tax while exempting others. The Court found both features objectionable. Concerning the second defect, we stated, "recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can jus-

tify the scheme." 460 U. S., at 592. The Court went on to hold that "[a] tax that singles out the press, *or that targets individual publications within the press*, places a heavy burden on the State to justify its action." *Id.*, at 592–593.

The North Carolina statute appears to discriminate among members of the press, selecting newspapers using one mode of delivery for a complete exemption from the sales/use tax while requiring all others to pay a tax on either their retail sales or the purchases of personal property that go into their publications. *Minneapolis Star* indicates that the State bears a heavy burden in justifying such a distinction. The North Carolina Supreme Court, however, applied mere rational-basis scrutiny in upholding the statute. To me, even the suggestion that the statutory distinction is rational is debatable;* if, as *Minneapolis Star* suggests, the statute is subject to more stringent scrutiny, the question whether it can survive is far from insubstantial.

The Court's dismissal may reflect discomfort with *Minneapolis Star*'s broad holding that taxes drawing distinctions among members of the press are suspect even when they do not discriminate on the basis of content and are not apparently designed to suppress speech. If that is so, it seems to me that a more proper way of establishing the bounds of the principle asserted in *Minneapolis Star* is to give this case plenary consideration and openly decide the substantial questions it presents. I would note probable jurisdiction and set the case down for oral argument.

No. 84–1553. ARANGO *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 461 So. 2d 932.

No. 84–1682. CICERO *v.* NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 4th Jud. Dept., dismissed for want of jurisdiction.

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*The difficulty in administering a sales tax that must be collected by children who serve as paperboys may well provide a rational basis for exempting the *retail sales* of newspapers sold through street vendors or newsboys from taxation. However, this rationale hardly seems to justify exempting such papers entirely from the sales/use tax scheme. Just as appellant and other free circulation newspapers are required to pay the sales or use tax on their purchases of personal property that form components of (or the entirety of) their final product, newspapers that are exempt from sales tax by virtue of their mode of distribution could easily be required to pay the use tax on their own purchases of the personal property that goes into their newspapers.

Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 106 App. Div. 2d 901, 483 N. Y. S. 2d 545.

No. 84–6572. PRENZLER *v.* PRENZLER. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 84–6579. MARCH *v.* MARCH. Appeal from Dist. Ct. App. Fla., 2d Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 461 So. 2d 947.

Vacated and Remanded on Appeal

No. 84–1150. HUMPHREY ET AL., DBA HUMPHREY & HAAS *v.* COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Appeal from Sup. Ct. Iowa. Judgment vacated and case remanded for further consideration in light of *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. 626 (1985). JUSTICE REHNQUIST and JUSTICE O'CONNOR would note probable jurisdiction and set case for oral argument. Reported below: 355 N. W. 2d 565.

Certiorari Granted—Vacated and Remanded

No. 84–1255. ALPHA BETA CO. ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (NAHM, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202 (1985). Reported below: 160 Cal. App. 3d 1049, 207 Cal. Rptr. 117.

No. 84–1663. NICHELSON *v.* QUAKER OATS CO. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Anderson* v. *Bessemer City*, 470 U. S. 564 (1985). Reported below: 752 F. 2d 1153.

No. 84–6159. KILPATRICK *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Court of Appeals with instructions to remand the case to the United States District Court for the District of Maryland with instructions to remand the case to the Secretary of Health and Human Services

for review pursuant to § 2(d)(2)(C) of the Social Security Disability Benefits Reform Act of 1984. Reported below: 740 F. 2d 962.

Miscellaneous Orders

No. A–884. HAYES *v.* CANNON ET AL. C. A. 9th Cir. Application for stay and/or other relief, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. D–477. IN RE DISBARMENT OF KENNEDY. Disbarment entered. [For earlier order herein, see 469 U. S. 1203.]

No. D–483. IN RE DISBARMENT OF BOND. Disbarment entered. [For earlier order herein, see 470 U. S. 1047.]

No. D–499. IN RE DISBARMENT OF JACOB. It is ordered that Felix Saul Jacob, of Towson, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–500. IN RE DISBARMENT OF WALTERS. It is ordered that Harris N. Walters, of Boynton, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–501. IN RE DISBARMENT OF CHARTIER. It is ordered that Charles A. Chartier, of Junction City, Kan., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–502. IN RE DISBARMENT OF ATKINS. It is ordered that Benjamin Sloan Atkins, of Atlanta, Ga., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–703. FLORIDA POWER & LIGHT CO. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL.; and

No. 83–1031. UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. *v.* LORION, DBA CENTER FOR NUCLEAR RESPONSIBILITY, ET AL., 470 U. S. 729. Motion of respondent Lorion to retax costs denied.

No. 84–1244. DAVIS ET AL. *v.* BANDEMER ET AL. D. C. S. D. Ind. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellants for divided argument to permit Mexican American Legal Defense and Educational Fund to present oral argument as *amicus curiae* denied.

No. 84–1288. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* JEFF D. ET AL., MINORS, BY AND THROUGH THEIR NEXT FRIEND, JOHNSON, ET AL. C. A. 9th Cir. [Certiorari granted, 471 U. S. 1098.] Motion for appointment of counsel granted, and it is ordered that Luvern Charles Johnson III, Esquire, of Pocatello, Idaho, be appointed to serve as counsel for respondents in this case.

No. 84–1360. CITY OF RENTON ET AL. *v.* PLAYTIME THEATRES, INC., ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 471 U. S. 1013.] Motion of appellees to exclude documents from the joint appendix denied.

No. 84–1480. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GREENFIELD. C. A. 11th Cir. [Certiorari granted, 471 U. S. 1098.] Motion for appointment of counsel granted, and it is ordered that James D. Whittemore, Esquire, of Tampa, Fla., be appointed to serve as counsel for respondent in this case.

No. 84–1485. MORAN, SUPERINTENDENT, RHODE ISLAND DEPARTMENT OF CORRECTIONS *v.* BURBINE. C. A. 1st Cir. [Certiorari granted, 471 U. S. 1098.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 84–6575. IN RE HOLLAND; and

No. 84–6583. IN RE THANH. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 84–1555. CONNOLLY ET AL., TRUSTEES OF THE OPERATING ENGINEERS PENSION TRUST *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL.; and

No. 84–1567. WOODWARD SAND CO., INC. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. Appeals from D. C. C. D. Cal. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 631 F. Supp. 640.

Certiorari Granted

No. 84–1198. TEXAS *v.* MCCULLOUGH. Ct. Crim. App. Tex. Certiorari granted. Reported below: 720 S. W. 2d 89.

No. 84–1503. CHICAGO TEACHERS UNION, LOCAL NO. 1, AFT, AFL–CIO, ET AL. *v.* HUDSON ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 743 F. 2d 1187.

No. 84–1077. WHITLEY, INDIVIDUALLY AND AS ASSISTANT SUPERINTENDENT, OREGON STATE PENITENTIARY, ET AL. *v.* ALBERS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 743 F. 2d 1372.

No. 84–1259. DOW CHEMICAL CO. *v.* UNITED STATES, BY AND THROUGH ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 6th Cir. Certiorari granted and case set for oral argument in tandem with No. 84–1513, *California* v. *Ciraolo* [certiorari granted, 471 U. S. 1134]. Reported below: 749 F. 2d 307.

Certiorari Denied. (See also Nos. 84–1553, 84–1682, 84–6572, and 84–6579, *supra*.)

No. 83–2067. MOURAD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 729 F. 2d 195.

No. 84–1007. NEW YORK *v.* FERRO. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 316, 472 N. E. 2d 13.

No. 84–1120. COMMITTEE ON PROFESSIONAL STANDARDS *v.* VON WIEGEN. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 163, 470 N. E. 2d 838.

No. 84–1193. MISSOURI *v.* SETTLE. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 679 S. W. 2d 310.

No. 84–1233. TRUCKEE-CARSON IRRIGATION DISTRICT *v.* SECRETARY OF THE INTERIOR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 527.

No. 84–1310. CULL, ADMINISTRATOR OF THE ESTATE OF CULL, ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. Reported below: 746 F. 2d 1148.

No. 84–1326. LAPLACA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 28.

No. 84–1347. REBALDO *v.* CUOMO, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 749 F. 2d 133.

No. 84–1413. COCHRANE & BRESNAHAN ET AL. *v.* PLAINTIFF CLASS REPRESENTATIVES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 748 F. 2d 157.

No. 84–1482. KARAPINKA *v.* UNION CARBIDE CORP. C. A. 2d Cir. Certiorari denied.

No. 84–1521. HENDRICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 751 F. 2d 381.

No. 84–1525. WAITS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 172 Ga. App. 524, 323 S. E. 2d 624.

No. 84–1542. CONSOLIDATED GAS TRANSMISSION CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 745 F. 2d 281.

No. 84–1587. EDDLETON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–1619. SMITH ET UX. *v.* MURPHY. Ct. App. Mo., Western Dist. Certiorari denied. Reported below: 682 S. W. 2d 42.

No. 84–1624. A. H. ROBINS CO., INC. *v.* THEIS, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS. C. A. 10th Cir. Certiorari denied.

No. 84–1626. SALSBURY, AS PARENT, NATURAL GUARDIAN, AND ADMINISTRATOR OF THE ESTATE OF SALSBURY *v.* ST. VINCENT HOSPITAL ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 923.

No. 84–1633. PHILADELPHIA ELECTRIC CO. *v.* BLACK GRIEVANCE COMMITTEE ET AL.; and

No. 84–1641. INDEPENDENT GROUP ASSN. *v.* BLACK GRIEVANCE COMMITTEE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 749 F. 2d 1072.

No. 84–1635. MAGNOLIA BROKERAGE CO. ET AL. *v.* JACKSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–1639. FRANK B. HALL & CO. INC. ET AL. *v.* BUCK. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 678 S. W. 2d 612.

No. 84–1643. KLIMEK *v.* TEDESCO LIMITED PARTNERSHIP ET AL. Sup. Ct. Va. Certiorari denied.

No. 84–1648. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 685 S. W. 2d 47.

No. 84–1649. GARLAND INDEPENDENT SCHOOL DISTRICT ET AL. *v.* WILKS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 742 F. 2d 1452.

No. 84–1652. SAN FRANCISCO NEWSPAPER PRINTING CO., DBA SAN FRANCISCO NEWSPAPER AGENCY *v.* SAN FRANCISCO WEB PRESSMEN'S UNION NO. 4. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1083.

No. 84–1653. TWILLIE ET AL. *v.* POUNCEY, SUPERINTENDENT, CRAWFORDSVILLE SCHOOL DISTRICT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 80.

No. 84–1657. MACLEOD *v.* COUNTY OF SANTA CLARA. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 541.

No. 84–1658. ATLANTIC RICHFIELD CO. *v.* DOUCET. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1074.

No. 84–1659. CONNECTICUT *v.* MARTIN. App. Ct. Conn. Certiorari denied. Reported below: 2 Conn. App. 605, 482 A. 2d 70.

No. 84–1662. GOLDBERG ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 756 F. 2d 949.

No. 84–1664. VALMET OY ET AL. *v.* BELOIT CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 155.

No. 84–1674. ENDER *v.* CHRYSLER CORP. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–1685. YEE *v.* VITOUSEK ET AL. Sup. Ct. Haw. Certiorari denied.

No. 84–1689. GANN ET UX. *v.* CITY OF PORTLAND. Ct. App. Ore. Certiorari denied. Reported below: 70 Ore. App. 355, 688 P. 2d 854.

No. 84–1751. FLORIDA *v.* GREAT AMERICAN BANK OF BROWARD COUNTY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 750 F. 2d 887.

No. 84–1785. GORDON *v.* NATIONAL AERONAUTICS AND SPACE ADMINISTRATION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 17, 750 F. 2d 1093.

No. 84–5892. MCMINN *v.* BATTISTI, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO. C. A. 6th Cir. Certiorari denied.

No. 84–6191. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–6234. EARLEY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 746 F. 2d 412.

No. 84–6268. FRYE *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 746 F. 2d 1011.

No. 84–6294. ALMOND *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 84–6301. HERRING *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 709.

No. 84–6396. HILL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 460 So. 2d 1206.

No. 84–6407. MCCLELLAND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 731 F. 2d 1438.

No. 84–6409. SPIESS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1078.

No. 84–6414. MARLOW *v.* TULLY, COMMISSIONER, DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK STATE. Ct. App. N. Y. Certiorari denied. Reported below: 63 N. Y. 2d 918, 472 N. E. 2d 1035.

No. 84–6416. MITCHELL *v.* BREWER, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 84–6485. LERNER *v.* GILL ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 751 F. 2d 450.

No. 84–6521. GAILES *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 128 Ill. App. 3d 339, 470 N. E. 2d 1152.

No. 84–6537. MAGEE *v.* BOLGER, POSTMASTER GENERAL OF THE UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1082.

No. 84–6571. SMITH *v.* CONNECTICUT PAROLE BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–6576. ACKER *v.* HAWAII. Sup. Ct. Haw. Certiorari denied.

No. 84–6587. KEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 122 Ill. App. 3d 491, 461 N. E. 2d 517.

No. 84–6602. LIKAKUR *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 84–6605. WALLACE *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS. C. A. 2d Cir. Certiorari denied.

No. 84–6606. LUNDY *v.* JONES, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 84–6607. HARPER *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied.

No. 84–6609. THOMAS *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 302 Md. 8, 485 A. 2d 249.

No. 84–6614. WILSON *v.* PULLEY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 84–6619. DOWNS *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 84–6620. KEMP *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 755 F. 2d 932.

No. 84–6661. HALLIWELL *v.* STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 747 F. 2d 607.

No. 84–6662. GOTCHER *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 753 F. 2d 1073.

No. 84–6665. EASTON *v.* OREGON STATE BAR. Sup. Ct. Ore. Certiorari denied. Reported below: 298 Ore. 365, 692 P. 2d 592.

No. 84–6666. MANNA, AKA IACOPELLI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1009.

No. 84–6715. ALVARADO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 762 F. 2d 991.

No. 84–6725. MELTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 757 F. 2d 283.

No. 84–6731. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 760 F. 2d 270.

No. 84–6733. SAINTIL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 753 F. 2d 984.

No. 84–901. AVCO FINANCIAL SERVICES, INC. *v.* DAVIS ET AL. C. A. 6th Cir. Motion of American Financial Services Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 739 F. 2d 1057.

No. 84–1466. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* SONGER. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 756 F. 2d 800.

No. 84–1530. TEXAS *v.* GRANGER. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 683 S. W. 2d 387.

No. 84–6166. SONGER *v.* FLORIDA. Sup. Ct. Fla.;
No. 84–6582. JONES *v.* VIRGINIA. Sup. Ct. Va.;
No. 84–6612. MAURER *v.* OHIO. Sup. Ct. Ohio; and
No. 84–6617. LUCAS *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 84–6166, 463 So. 2d 229; No. 84–6582, 228 Va. 427, 323 S. E. 2d 554; No. 84–6612, 15 Ohio St. 3d 239, 473 N. E. 2d 768; No. 84–6617, 285 S. C. 37, 328 S. E. 2d 63.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 83–6361. MANZANARES *v.* NEW MEXICO, 471 U. S. 1057;
No. 84–1083. WEST, AS MOTHER AND ADMINISTRATRIX OF THE ESTATE OF WEST, ET AL. *v.* UNITED STATES, 471 U. S. 1053;
No. 84–5035. SPIKES *v.* INDIANA, 471 U. S. 1001;
No. 84–6073. NELSON *v.* LOUISIANA, 471 U. S. 1030;
No. 84–6154. ALBANESE *v.* ILLINOIS, 471 U. S. 1044;
No. 84–6378. MAXWELL *v.* BORDEN, INC., 471 U. S. 1057;
No. 84–6386. NEELY *v.* CENTRAL INTELLIGENCE AGENCY, 471 U. S. 1022; and
No. 84–6440. HARTER *v.* SHULTZ, SECRETARY OF STATE, ET AL., 471 U. S. 1068. Petitions for rehearing denied.

JUNE 17, 1985

Appointment of Clerk

It is ordered that Joseph F. Spaniol, Jr., be appointed Clerk of the Court to succeed Alexander L. Stevas, effective at the commencement of business, August 1, 1985, and that he take the oath of office as required by statute.

Appointment of Librarian

It is ordered that Stephen G. Margeton be appointed Librarian of the Court to succeed Roger F. Jacobs, effective at the commencement of business, July 15, 1985, and that he take the oath of office as required by statute.

Appeals Dismissed

No. 84–1517. FAHEY *v.* AXELROD, COMMISSIONER OF HEALTH OF THE STATE OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 3d Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 105 App. Div. 2d 537, 481 N. Y. S. 2d 481.

No. 84–1817. THIBAULT *v.* WEISS ET AL. Appeal from C. A. 3d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 760 F. 2d 262.

No. 84–1818. WILLIAMS ET UX. *v.* GOVINE ET AL. Appeal from D. C. Conn. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 84–315. LEVERSON *v.* CONWAY, COMMISSIONER, VERMONT DEPARTMENT OF MOTOR VEHICLES, 469 U. S. 926. Petition for rehearing granted and order entered October 29, 1984, vacated. Judgment vacated and case remanded to the Supreme Court of Vermont for further consideration in light of *Williams* v. *Vermont*, *ante*, p. 14.

No. 84–1630. BLUE CROSS HOSPITAL SERVICE, INC. OF MISSOURI, ET AL. *v.* FRAPPIER, DIRECTOR OF THE DEPARTMENT OF CONSUMER AFFAIRS, REGULATION, AND LICENSING OF MISSOURI, ET AL. Appeal from Sup. Ct. Mo. Judgment vacated and case remanded for further consideration in light of *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U. S. 724 (1985). Reported below: 681 S. W. 2d 925.

Certiorari Granted—Vacated and Remanded

No. 84–6021. SANDERS *v.* ROBINSON ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *National Farmers Union Ins. Co.* v. *Crow Tribe*, 471 U. S. 845 (1985). Reported below: 749 F. 2d 38.

Miscellaneous Orders

No. A–831. KLEVENHAGEN, SHERIFF OF HARRIS COUNTY, TEXAS, ET AL. *v.* ALBERTI ET AL. Application for stay of orders of the United States District Court for the Southern District of Texas pending appeal to the United States Court of Appeals for the Fifth Circuit, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–881 (84–1851). GILLOCK *v.* UNITED STATES. C. A. 6th Cir. Application to recall and stay mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. A–913. KENO *v.* JONES. Super. Ct. N. J., Chan. Div. Application for stay, addressed to JUSTICE BLACKMUN and referred to the Court, denied.

No. D–503. IN RE DISBARMENT OF SMITH. It is ordered that Frederick A. Smith, of Truth or Consequences, N. M., be suspended from the practice of law in this Court and that a rule issue,

returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Report of the Special Master on the Massachusetts boundary is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days. [For earlier decision herein, see, *e. g.*, 471 U. S. 375.]

No. 101, Orig. PENNSYLVANIA *v.* ALABAMA ET AL. Motion for leave to file bill of complaint denied.

No. 83–1807. EASTERN AIR LINES, INC. *v.* MAHFOUD ON BEHALF OF MAHFOUD ET AL. C. A. 5th Cir. [Certiorari granted, 469 U. S. 814.] Case restored to calendar for reargument.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of Government of Japan for leave to file a brief as *amicus curiae* granted.

No. 84–773. BENDER ET AL. *v.* WILLIAMSPORT AREA SCHOOL DISTRICT ET AL. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1206.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS would deny this motion.

No. 84–1044. PACIFIC GAS & ELECTRIC CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Sup. Ct. Cal. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of appellees Toward Utility Rate Normalization et al. for divided argument denied. JUSTICE BLACKMUN and JUSTICE POWELL took no part in the consideration or decision of this motion.

No. 84–6716. IN RE JOKINEN. Petition for writ of mandamus denied.

Probable Jurisdiction Noted

No. 84–978. EXXON CORP. ET AL. *v.* HUNT, ADMINISTRATOR OF NEW JERSEY SPILL COMPENSATION FUND, ET AL. Appeal from Sup. Ct. N. J. Probable jurisdiction noted. Reported below: 97 N. J. 526, 481 A. 2d 271.

No. 84–780. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* ROY ET AL. Appeal from D. C. M. D. Pa. Probable jurisdiction noted and case set for oral argument in tandem with No. 84–1097, *Goldman* v. *Weinberger, infra.* Reported below: 590 F. Supp. 600.

Certiorari Granted

No. 84–1160. PEMBAUR *v.* CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 746 F. 2d 337.

No. 84–1529. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* AMERICAN HOSPITAL ASSN. ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 794 F. 2d 676.

No. 84–1644. GOLDEN STATE TRANSIT CORP. *v.* CITY OF LOS ANGELES. C. A. 9th Cir. Certiorari granted. Reported below: 754 F. 2d 830.

No. 84–1686. SORENSON *v.* SECRETARY OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 752 F. 2d 1433.

No. 84–1097. GOLDMAN *v.* WEINBERGER, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari granted and case set for oral argument in tandem with No. 84–780, *Heckler* v. *Roy, supra.* Reported below: 236 U. S. App. D. C. 248, 734 F. 2d 1531.

No. 84–1640. UNITED STATES *v.* MECHANIK ET AL.;
No. 84–1700. LILL *v.* UNITED STATES; and
No. 84–1704. MECHANIK *v.* UNITED STATES. C. A. 4th Cir. Certiorari granted in Nos. 84–1640 and 84–1700. Certiorari granted in No. 84–1704 limited to Question 1 presented by the petition. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 756 F. 2d 994.

Certiorari Denied. (See also Nos. 84–1517 and 84–1817, *supra.*)

No. 83–1811. R. J. WILLIAMS CO. ET AL. *v.* FORT BELKNAP HOUSING AUTHORITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 979.

No. 84–797. BENNETT *v.* CITY OF SLIDELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 728 F. 2d 762 and 735 F. 2d 861.

No. 84–954. CITY OF PRAIRIE VIEW, TEXAS, ET AL. *v.* THOMAS. C. A. 5th Cir. Certiorari denied. Reported below: 734 F. 2d 185 and 741 F. 2d 783.

No. 84–1148. HOBSON *v.* UNITED STATES; and
No. 84–1403. VILLANUEVA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 742 F. 2d 1335.

No. 84–1225. COSTANZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 740 F. 2d 251.

No. 84–1270. CARPENTERS LOCAL UNION NO. 35 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 739 F. 2d 479.

No. 84–1300. UDEY *v.* UNITED STATES;
No. 84–1368. RUSSELL *v.* UNITED STATES; and
No. 84–6333. GINTER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 1231.

No. 84–1332. BLAUVELT *v.* UNITED STATES; and
No. 84–1352. BLAUVELT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 67.

No. 84–1363. MASSACHUSETTS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 749 F. 2d 89.

No. 84–1377. CABLE NEWS NETWORK, INC. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 752 F. 2d 16.

No. 84–1388. DARVILLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 754 F. 2d 376.

No. 84–1399. WARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–1419. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 751 F. 2d 614.

No. 84–1449. CERRI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 61.

No. 84–1465. AMBROSE ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 740 F. 2d 505.

No. 84–1481. HUNT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 1078.

No. 84–1499. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 60 Md. App. 716.

No. 84–1593. BRUNSWICK CORP. *v.* RIEGEL TEXTILE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 261.

No. 84–1622. BECTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 751 F. 2d 250.

No. 84–1650. TENNESSEE EX REL. CODY, ATTORNEY GENERAL *v.* DOLE, SECRETARY OF TRANSPORTATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 749 F. 2d 331.

No. 84–1673. SCHOR ET AL. *v.* CONTICOMMODITY SERVICES, INC., ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 239 U. S. App. D. C. 159, 740 F. 2d 1262.

No. 84–1675. PAKISTAN NATIONAL SHIPPING CORP. *v.* MOUNT ROYAL MARINE REPAIRS, LTD., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 755 F. 2d 914.

No. 84–1687. BUBAR ET AL. *v.* AMPCO FOODS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 445.

No. 84–1701. VANDENPLAS ET AL. *v.* CITY OF MUSKEGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 555.

No. 84–1716. WILSON ET AL. *v.* NORTH CAROLINA MUTUAL LIFE INSURANCE COMPANY OF DURHAM ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 241 U. S. App. D. C. 174, 746 F. 2d 907.

No. 84–6005. WILLIAMS *v.* PROCUNIER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 84–6113. STANLEY *v.* TEXAS. Ct. App. Tex., 4th Sup. Jud. Dist. Certiorari denied. Reported below: 664 S. W. 2d 746.

No. 84–6239. REICKENBACKER *v.* LENNON, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 747 F. 2d 1463.

No. 84–6253. BAHRAMIAN *v.* CITY PLANNING COMMISSION OF THE CITY OF CINCINNATI ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 729 F. 2d 1460.

No. 84–6261. BENFIELD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 750 F. 2d 1169.

No. 84–6343. ALLEN *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 284 Ark. xxii.

No. 84–6406. SHIPP *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 754 F. 2d 1427.

No. 84–6417. WILLIAMS *v.* LEHIGH COUNTY COURT OF COMMON PLEAS ET AL. C. A. 3d Cir. Certiorari denied.

No. 84–6430. WILLIAMS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 485 A. 2d 950.

No. 84–6458. DONEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6478. WALDROP *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 462 So. 2d 1021.

No. 84–6515. BAKER *v.* DUCKWORTH, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 752 F. 2d 302.

No. 84–6591. PRENTICE *v.* ILCHERT, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1487.

No. 84–6613. RUSNIACZEK *v.* UNITED AIR LINES. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 374.

No. 84–6622. GANEY *v.* ANDERSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 927.

No. 84–6623. GANEY *v.* WOODARD ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 760 F. 2d 264.

No. 84–6624. GANEY *v.* BAREFOOT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 1124.

No. 84–6625. GANEY *v.* FOX ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 927.

No. 84–6626. GANEY *v.* BRUNJES ET AL. Sup. Ct. N. C. Certiorari denied.

No. 84–6627. THOMAS *v.* ANGELONE, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6628. SPRECK *v.* CHICAGO HOUSING AUTHORITY. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 125 Ill. App. 3d 1156, 481 N. E. 2d 358.

No. 84–6629. MOELLER *v.* SOLEM, WARDEN. Sup. Ct. S. D. Certiorari denied. Reported below: 363 N. W. 2d 412.

No. 84–6632. MARTIN *v.* WOODARD, SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 753 F. 2d 1071.

No. 84–6635. MATTHEWS *v.* OHIO. Ct. App. Ohio, Shelby County. Certiorari denied.

No. 84–6638. SMITH *v.* MANSKE ET AL. Sup. Ct. Kan. Certiorari denied.

No. 84–6640. MARK *v.* BROOKS ET AL. Ct. App. Wash. Certiorari denied. Reported below: 39 Wash. App. 1004.

No. 84–6641. SPAN *v.* MCCALL. C. A. 11th Cir. Certiorari denied.

No. 84–6642. PICKETT *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–6647. COOPER *v.* RIEDERER ET AL. C. A. 8th Cir. Certiorari denied.

No. 84–6658. BEACHBOARD *v.* MIDDLE STATES ASSOCIATION OF COLLEGES AND SCHOOLS. C. A. D. C. Cir. Certiorari denied. Reported below: 243 U. S. App. D. C. 348, 753 F. 2d 166.

No. 84–6675. MEADOWS *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–6685. WYNN *v.* FORD, SUPERINTENDENT, JACK T. RUTLEDGE CORRECTIONAL INSTITUTION. C. A. 11th Cir. Certiorari denied. Reported below: 756 F. 2d 884.

No. 84–6722. BYANSKI *v.* BROCK, SECRETARY OF LABOR, ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6729. JEWELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 749 F. 2d 33.

No. 84–6740. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 251.

No. 84–6744. GLINSMAN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 64 N. Y. 2d 889, 476 N. E. 2d 1013.

No. 84–6746. WARD *v.* UNITED STATES ATTORNEY. C. A. 5th Cir. Certiorari denied.

No. 84–6762. BORMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 84–6763. DUNTON *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 765 F. 2d 156.

No. 84–6782. ROMIEH *v.* MONTGOMERY COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 84–6783. ROMIEH *v.* GILCHRIST, MONTGOMERY COUNTY EXECUTIVE, ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 84–1164. WALDROP *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari limited to Question 1 presented by the petition. Reported below: 742 F. 2d 1335.

No. 84–1655. LAFFEY ET AL. *v.* NORTHWEST AIRLINES, INC. C. A. D. C. Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 241 U. S. App. D. C. 11, 746 F. 2d 4.

No. 84–1660. MOORE *v.* CITY OF CHARLOTTE, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 754 F. 2d 1100.

No. 84–1678. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* N. A. A. C. P. LEGAL DEFENSE &

EDUCATIONAL FUND, INC. C. A. D. C. Cir. Certiorari denied. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 243 U. S. App. D. C. 313, 753 F. 2d 131.

No. 84–1746. K N ENERGY, INC. *v.* GREAT WESTERN SUGAR CO. Sup. Ct. Colo. Motion of Interstate Natural Gas Association of America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 698 P. 2d 769.

No. 84–6634. STOUT *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 84–6636. ROSS *v.* GEORGIA. Sup. Ct. Ga.; and
No. 84–6727. CELESTINE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: No. 84–6634, 693 P. 2d 617; No. 84–6636, 254 Ga. 22, 326 S. E. 2d 194; No. 84–6727, 750 F. 2d 353.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 84–315, *supra.*)

Rehearing Denied

No. 84–1394. MATCHETT *v.* CHICAGO BAR ASSN. ET AL., 471 U. S. 1054;
No. 84–5343. HUX *v.* MURPHY, WARDEN, ET AL., 471 U. S. 1103; and
No. 84–6496. IN RE HUNTER, 471 U. S. 1098. Petitions for rehearing denied.

JUNE 19, 1985

Dismissals Under Rule 53

No. 84–1691. PRITCHARD-KEANG NAM CORP. ET AL. *v.* JAWORSKI ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 751 F. 2d 277.

No. 84–1820. CATALDO *v.* EVERETT. App. Term., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari dismissed under this Court's Rule 53.

Dismissal Under Rule 53

No. 83–1248. MOBIL OIL CORP. ET AL. *v.* BATCHELDER ET AL. Sup. Ct. Kan. Certiorari dismissed as to petitioners Mobil Oil Corp., MAPCO Oil & Gas Co., Inc., Fuqua Industries, Inc., and Amoco Production Co. under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

JUNE 24, 1985

Dismissal Under Rule 53

No. 83–1278. CITIES SERVICE OIL CO. ET AL. *v.* MATZEN ET AL. Sup. Ct. Kan. Certiorari dismissed under this Court's Rule 53. Reported below: 233 Kan. 846, 667 P. 2d 337.

Appeals Dismissed

No. 84–1714. SLINGERLAND *v.* OLSON, CHAIRMAN, VERMONT BOARD OF BAR EXAMINERS, ET AL. Appeal from Sup. Ct. Vt. dismissed for want of substantial federal question.

No. 84–6694. WILLIAMS ET AL. *v.* GRAND LODGE OF FREEMASONRY ET AL. Appeal from Ct. App. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 355 N. W. 2d 477.

Certiorari Granted—Vacated and Remanded

No. 84–1192. GAF CORP. *v.* CHENG. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to dismiss the appeal for want of jurisdiction. Reported below: 747 F. 2d 97.

No. 84–5092. BOOKER *v.* MISSISSIPPI, 469 U. S. 873. Petition for rehearing granted and order entered October 1, 1984, denying certiorari, vacated. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded to the Supreme Court of Mississippi for further consideration in light of *Caldwell* v. *Mississippi*, *ante*, p. 320.

Miscellaneous Orders

No. A–914. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Application for stay of mandate, addressed to JUSTICE MARSHALL and referred to the Court, denied.

No. D–504. IN RE DISBARMENT OF HOWARD. It is ordered that James Norman Howard, of Lakeside Park, Ky., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–505. IN RE DISBARMENT OF HURD. It is ordered that Calvin J. Hurd, of Elizabeth, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–506. IN RE DISBARMENT OF DANIELS. It is ordered that Phillip C. Daniels, Jr., of Merchantsville, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–507. IN RE DISBARMENT OF ROTH. It is ordered that Burnett Roth, of Miami Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–508. IN RE DISBARMENT OF SHORT. It is ordered that Kenneth Dale Short, of Ellicott City, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–2004. MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL. *v.* ZENITH RADIO CORP. ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1002.] Motion of Governments of Australia et al. for leave to file a brief as *amici curiae* granted.

No. 84–468. CITY OF CLEBURNE, TEXAS, ET AL. *v.* CLEBURNE LIVING CENTER, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 469 U. S. 1016.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 84–801. MIDLANTIC NATIONAL BANK *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; and

No. 84–805. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORP., DEBTOR *v.* CITY OF NEW YORK ET AL.; and O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES

CORP., DEBTOR *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. C. A. 3d Cir. [Certiorari granted, 469 U. S. 1207.] Motion of petitioner Midlantic National Bank for divided argument granted.

No. 84–1076. TRANSCONTINENTAL GAS PIPE LINE CORP. *v.* STATE OIL AND GAS BOARD OF MISSISSIPPI ET AL. Sup. Ct. Miss. [Probable jurisdiction noted, 470 U. S. 1083.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of appellees State Oil and Gas Board of Mississippi et al. for divided argument granted. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 84–1513. CALIFORNIA *v.* CIRAOLO. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 471 U. S. 1134.] Motion for appointment of counsel granted, and it is ordered that Marshall W. Krause, Esquire, of Larkspur, Cal., be appointed to serve as counsel for respondent in this case pursuant to Rule 46.6 of the Rules of this Court.

No. 84–5786. MILLER *v.* FENTON, SUPERINTENDENT, RAHWAY STATE PRISON, ET AL. C. A. 3d Cir. [Certiorari granted, 471 U. S. 1003.] Motion of petitioner for divided argument denied.

No. 84–1733. DE NARDO *v.* WILLIAMS ET AL. C. A. 9th Cir. Petition for writ of common-law certiorari denied. Reported below: 755 F. 2d 935.

No. 84–1709. IN RE BELL; and

No. 84–6671. IN RE WALDON. Petitions for writs of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 84–1491. PHILADELPHIA NEWSPAPERS, INC., ET AL. *v.* HEPPS ET AL. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. Reported below: 506 Pa. 304, 485 A. 2d 374.

No. 84–871. LOUISIANA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. Appeal from C. A. 4th Cir.;

No. 84–889. CALIFORNIA ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir.;

No. 84–1054. PUBLIC UTILITIES COMMISSION OF OHIO ET AL. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir.; and

No. 84–1069. FLORIDA PUBLIC SERVICE COMMISSION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. Further consideration of question of jurisdiction postponed to hearing of case on the merits in No. 84–871. Certiorari granted in Nos. 84–889, 84–1054, and 84–1069. Cases consolidated and a total of one hour allotted for oral argument. Cases set for oral argument in tandem with No. 84–1362, *Public Service Commission of Maryland* v. *Chesapeake & Potomac Telephone Company of Maryland, infra.* JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this order. Reported below: 737 F. 2d 388.

Certiorari Granted. (See also Nos. 84–889, 84–1054, and 84–1069, *supra.*)

No. 84–1616. PARSONS STEEL, INC., ET AL. *v.* FIRST ALABAMA BANK, N. A., ET AL. C. A. 11th Cir. Certiorari granted. Reported below: 747 F. 2d 1367.

No. 84–1728. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 240 U. S. App. D. C. 218, 744 F. 2d 842.

No. 84–1362. PUBLIC SERVICE COMMISSION OF MARYLAND *v.* CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND. C. A. 4th Cir. Certiorari granted and case set for oral argument in tandem with No. 84–871, *Louisiana Public Service Commission* v. *FCC;* No. 84–889, *California* v. *FCC;* No. 84–1054, *Public Utilities Commission of Ohio* v. *FCC;* and No. 84–1069, *Florida Public Service Commission* v. *FCC, supra.* JUSTICE POWELL and JUSTICE O'CONNOR took no part in the consideration or decision of this order. Reported below: 748 F. 2d 879.

No. 84–1479. HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY *v.* WILSON. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 742 F. 2d 741.

No. 84–1606. HOLBROOK, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, ET AL. *v.* FLYNN. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 749 F. 2d 961.

Certiorari Denied. (See also Nos. 84–6694 and 84–1733, *supra.*)

No. 84–473. CERTAIN *v.* CITY OF HUNTSVILLE, ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 453 So. 2d 715.

No. 84–754. CITICORP *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. (two cases). C. A. 2d Cir. Certiorari denied.

No. 84–806. BUCKINGHAM CORP. *v.* ODOM CORP., DBA ARIZONA DISTRIBUTING CO. C. A. 9th Cir. Certiorari denied. Reported below: 742 F. 2d 1461.

No. 84–948. CRAWFORD COUNTY, WISCONSIN *v.* HEIAR ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 746 F. 2d 1190.

No. 84–1271. JOHNSON, EXECUTRIX OF THE ESTATE OF JOHNSON, ET AL. *v.* AMERICAN AIRLINES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 745 F. 2d 988.

No. 84–1373. FAUL *v.* UNITED STATES;
No. 84–6332. BROER *v.* UNITED STATES; and
No. 84–6350. KAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 748 F. 2d 1204.

No. 84–1404. HUENE ET UX. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 745 F. 2d 1216.

No. 84–1406. MARRESE ET AL. *v.* INTERQUAL, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 748 F. 2d 373.

No. 84–1425. NORTHERN ILLINOIS GAS CO. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 743 F. 2d 539.

No. 84–1437. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 748 F. 2d 185.

No. 84–1518. TRI-STATE MOTOR TRANSIT CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 739 F. 2d 1373.

No. 84–1549. COBB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 751 F. 2d 1259.

No. 84–1611. LANCASTER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 124 Ill. App. 3d 1150, 480 N. E. 2d 878.

No. 84–1623. VOLUNTEERS OF AMERICA—MINNESOTA-BAR NONE BOYS RANCH *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 752 F. 2d 345.

No. 84–1647. GENERAL MOTORS CORP. ET AL. *v.* MITCHELL. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 385.

No. 84–1669. ST. MARY'S HOSPITAL MEDICAL CENTER *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1362.

No. 84–1680. DUNBAR STONE CO., INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1081.

No. 84–1695. COUNTY OF MULTNOMAH ET AL. *v.* ACKERLEY COMMUNICATIONS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 752 F. 2d 1394.

No. 84–1697. MORI *v.* GITTLEMAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 755 F. 2d 921.

No. 84–1703. EHLENFELDT *v.* C. W. TRANSPORT, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 753 F. 2d 1079.

No. 84–1707. TOM HUDSON & ASSOCIATES, INC., ET AL. *v.* CITY OF CHULA VISTA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 746 F. 2d 1370.

No. 84–1711. COX *v.* SUPREME COURT OF FLORIDA ET AL. Sup. Ct. Fla. Certiorari denied.

No. 84–1713. BRENNER *v.* UNIVERSAL-RESILITE CO. C. A. 1st Cir. Certiorari denied.

No. 84–1719. FELDMAN *v.* JACKSON MEMORIAL HOSPITAL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 752 F. 2d 647.

No. 84–1727. JOHNSON *v.* EDUCATIONAL TESTING SERVICE. C. A. 1st Cir. Certiorari denied. Reported below: 754 F. 2d 20.

No. 84–1732. FREIGHT CHECKERS, CLERICAL EMPLOYEES & HELPERS, LOCAL 856 *v.* ALDERSON. C. A. 9th Cir. Certiorari denied. Reported below: 751 F. 2d 389.

No. 84–1752. SIXTA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 84–1769. MAYFIELD *v.* AUBURN UNIVERSITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 732.

No. 84–1790. TERRELL, AKA FORD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 754 F. 2d 1139.

No. 84–1797. JONES ET AL. *v.* REAGAN, PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 748 F. 2d 1331.

No. 84–1806. LAMPITT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 753 F. 2d 702.

No. 84–1811. AFFLERBACH ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 754 F. 2d 866.

No. 84–1813. SHELTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 752 F. 2d 220.

No. 84–1825. MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 740 F. 2d 1352 and 757 F. 2d 770.

No. 84–1837. KELLY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1541.

No. 84–1843. HILJER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF HILJER *v.* WALTERS, ADMINISTRATOR OF VETERANS AFFAIRS. C. A. 11th Cir. Certiorari denied. Reported below: 749 F. 2d 1553.

No. 84–6106. GRAVELY *v.* HOLLAND, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 84–6289. MCCOY *v.* GORDON, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 750 F. 2d 66.

No. 84–6346. LEE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 751 F. 2d 380.

No. 84–6377. COATES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 482 A. 2d 1239.

No. 84–6412. FRANCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 753 F. 2d 1084.

No. 84–6567. HOWARD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 751 F. 2d 336.

No. 84–6643. SMITH *v.* CONNECTICUT PAROLE BOARD ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 751 F. 2d 368.

No. 84–6644. WILSON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 687 S. W. 2d 720.

No. 84–6655. JOHNSON *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 794 F. 2d 676.

No. 84–6669. MATLACK *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 695 P. 2d 635.

No. 84–6672. WESER *v.* MASCHNER, DIRECTOR, KANSAS STATE PENITENTIARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 84–6678. WILLIAMS *v.* LENSING ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6683. FRANKS *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 755 F. 2d 927.

No. 84–6686. LARSON *v.* MULCRONE ET AL. C. A. 7th Cir. Certiorari denied.

No. 84–6687. FORD *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 84–6688. BOWIE *v.* CADY ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 749 F. 2d 34.

No. 84–6693. YOUNG *v.* SPELLMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 749 F. 2d 39.

No. 84–6695. TENNART *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 84–6696. SEITU *v.* COUNTISS ET AL. C. A. 5th Cir. Certiorari denied.

No. 84–6699. DEPREE *v.* NEW YORK STATE DEPARTMENT OF LABOR ET AL. C. A. 2d Cir. Certiorari denied.

No. 84–6705. BAUCOM *v.* CUPP, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 84–6709. FOWLER *v.* JOHNSON ET AL. C. A. 11th Cir. Certiorari denied.

No. 84–6713. IVERY *v.* KENT STATE UNIVERSITY. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1008.

No. 84–6723. LOVELACE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 119 Ill. App. 3d 1163, 471 N. E. 2d 250.

No. 84–6726. HUTCHINGS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 757 F. 2d 11.

No. 84–6738. SHAHRYAR *v.* MARTIN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 84–6769. ARTHUR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 755 F. 2d 174.

No. 84–6770. KOON *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 463 So. 2d 201.

No. 84–6777. GEIGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 765 F. 2d 136.

No. 84–6781. ARDUENGO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84–6790. DEVINCENT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 760 F. 2d 252.

No. 84–6796. PEPPARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 762 F. 2d 1013.

No. 84–6798. FULGHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 758 F. 2d 658.

No. 84–1212. INDIANA *v.* MINNICK. Sup. Ct. Ind. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 467 N. E. 2d 754.

No. 84–1515. INTERSTATE COMMERCE COMMISSION ET AL. *v.* TRI-STATE MOTOR TRANSIT CO. ET AL. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 739 F. 2d 1373.

No. 84–1712. INTERSTATE COMMERCE COMMISSION ET AL. *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 730 F. 2d 409 and 749 F. 2d 1144.

No. 84–1698. SPURLOCK ET AL. *v.* SANTA FE PACIFIC RAILROAD CO. ET AL. Ct. App. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 143 Ariz. 469, 694 P. 2d 299.

No. 84–1705. PRESTRESS ENGINEERING CORP. *v.* GONZALEZ ET AL. Sup. Ct. Ill. Certiorari denied. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 105 Ill. 2d 143, 473 N. E. 2d 1280.

No. 84–1740. FLEMING *v.* MOORE. Sup. Ct. Va. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 229 Va. 1, 325 S. E. 2d 713.

No. 84–1761. TIMBERLANE LUMBER CO. ET AL. *v.* BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSN. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 749 F. 2d 1378.

No. 84–5717. MOORE *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir.; and

No. 84–6621. JENKINS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: No. 84–5717, 740 F. 2d 308; No. 84–6621, 15 Ohio St. 3d 164, 473 N. E. 2d 264.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth

and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 84–5092, *supra*.)

Rehearing Denied

No. 84–1109. BOTHKE *v.* RACCA, 471 U. S. 1065;

No. 84–1283. LUNA *v.* HOUSE OF SOFAS ET AL., 471 U. S. 1016;

No. 84–1467. PALMER ET UX. *v.* TUCKER ET AL., 471 U. S. 1101;

No. 84–1583. WALBER, DBA WALBER CONSTRUCTION CO. *v.* UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 471 U. S. 1095;

No. 84–5350. MAXWELL *v.* PENNSYLVANIA, 469 U. S. 971;

No. 84–6030. GLASS *v.* LOUISIANA, 471 U. S. 1080;

No. 84–6390. COQUILLIAN *v.* JONES, WARDEN, 471 U. S. 1105; and

No. 84–6394. BROWN *v.* SCHWEITZER ET AL., 471 U. S. 1105. Petitions for rehearing denied.

JUNE 25, 1985

Miscellaneous Order

No. A–964. MILTON *v.* MCCOTTER, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death scheduled for Tuesday, June 25, 1985, presented to JUSTICE WHITE, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and a petition for writ of certiorari and would vacate the death sentence in this case.

Certiorari Denied

No. 84–6960 (A–959). MASON *v.* SIELAFF, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE

CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 767 F. 2d 912.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay and the petition for writ of certiorari and would vacate the death sentence in this case.

INDEX

ADMINISTRATIVE PROCEDURE ACT. See **Aliens.**

ADULT BOOKSTORES. See **Constitutional Law,** V, 3; VII, 1.

ADVICE AS TO INVESTMENTS. See **Investment Advisers Act of 1940.**

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

1. *Mandatory retirement—Airline pilots and flight engineers.*—Where (1) petitioner airline required that its flight engineers retire at age 60, (2) respondent flight engineers forced to retire at age 60 and pilots who, upon reaching 60 (prohibited by a federal regulation from continuing to serve as a pilot), were denied reassignment as flight engineers brought suit against petitioner, contending that retirement requirement for flight engineers violated Act, and (3) petitioner asserted defense under Act that requirement was a "bona fide occupational qualification," reasonably necessary to airline's safe operation, jury instructions as to petitioner's burden of proving such defense were proper as to elements of defense under applicable standard and were sufficiently protective of public safety. Western Air Lines, Inc. v. Criswell, p. 400.

2. *Mandatory retirement—Firefighters.*—A federal civil service statute requiring most federal firefighters to retire at age 55 does not, as a matter of law, establish that age 55 is a "bona fide occupational qualification" for nonfederal firefighters within Act's meaning. Johnson v. Mayor & City Council of Baltimore, p. 353.

AIRLINE PILOTS. See **Age Discrimination in Employment Act of 1967,** 1.

ALABAMA. See **Constitutional Law,** I, 2; IV, 1.

ALIENS.

Detention without parole—Change of INS policy—Discrimination.—Where (1) petitioner representatives of a certain class of aliens contended that Immigration and Naturalization Service's change from its policy of general parole for undocumented aliens seeking admission to a new policy, not based on a statute or regulation, of detention without parole for aliens who could not present a prima facie case for admission, violated rulemaking procedures of Administrative Procedure Act and Fifth Amendment equal protection guarantee by discriminating against petitioners on basis of race

ALIENS—Continued.
and national origin, (2) District Court rejected Fifth Amendment claim but held for petitioners on APA claim, staying injunctive relief to permit INS to comply with APA, and (3) INS then promulgated a new rule prohibiting consideration of race or national origin, Court of Appeals erred in addressing constitutional issue, since current law provided petitioners with nondiscriminatory parole consideration, but properly remanded case to permit review of officials' exercise of discretion under new nondiscriminatory rule. Jean v. Nelson, p. 846.

ANTITRUST ACTS.

1. *Monopolization—Skiing facilities.*—Where (1) petitioner, current owner of all but one of downhill skiing facilities at Aspen, Colo., had participated in earlier years with competitors (including respondent) in plan whereby each competitor sold both tickets for use of its own facilities and interchangeable all-Aspen tickets, (2) after acquiring all of Aspen facilities but respondent's, petitioner ultimately refused to participate in sale of all-Aspen tickets and made it extremely difficult for respondent to market its own multiarea package, and (3) respondent filed a treble-damages action, alleging that petitioner had monopolized market in violation of § 2 of Sherman Act, record was adequate to support jury's verdict for respondent. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., p. 585.

2. *Wholesale purchasing cooperative—Expulsion of member—Group boycott.*—Respondent's expulsion from membership in petitioner, a wholesale purchasing cooperative consisting of office supply retailers, without any explanation, notice, or hearing, did not fall within category of activity that is conclusively presumed to be anticompetitive so as to mandate *per se* invalidation under § 1 of Sherman Act as a group boycott or concerted refusal to deal. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., p. 284.

ARBITRATION. See **Civil Service Reform Act of 1978.**

ARKANSAS. See **Internal Revenue Code.**

ARMED FORCES OPEN HOUSE FOR PUBLIC. See **Constitutional Law**, V, 2.

ARRESTS. See **Constitutional Law**, VII, 1.

ATTORNEY GENERAL'S IMMUNITY FROM SUIT FOR ILLEGAL WIRETAPS. See **Constitutional Law**, VII, 2; **Jurisdiction**, 1.

ATTORNEYS.

Suspension from practice—Respect for court.—Where (1) petitioner, an attorney appointed to represent a defendant under Criminal Justice Act, received an award from District Court for services and expenses, (2) pur-

ATTORNEYS—Continued.

suant to Act, Chief Judge of Court of Appeals reviewed claim and sought additional documentation from petitioner, who could not provide information in requested form but filed a supplemental application, which was returned as being unacceptable, (3) after discussing matter with District Judge's secretary, petitioner wrote a letter to her in which (in "harsh" tones) he refused to submit further documentation or accept further assignments under Act and criticized administration of Act, (4) after discussing manner of processing fees with petitioner, District Judge forwarded letter to Chief Judge, and (5) Court of Appeals ultimately imposed a 6-month suspension of petitioner's right to practice in federal courts in Circuit for "refusal to show continuing respect for the court" after he refused to apologize for his letter, petitioner's conduct did not warrant his suspension. In re Snyder, p. 634.

ATTORNEY'S DISQUALIFICATION. See **Jurisdiction**, 2.

ATTORNEY'S FEES. See **Attorneys.**

AUDITS OF EMPLOYER RECORDS. See **Employee Retirement Income Security Act of 1974.**

AUTOMOBILE USE TAXES. See **Constitutional Law**, III, 1.

BANK ACCOUNTS AS SUBJECT TO TAX LEVY. See **Internal Revenue Code.**

BANK HOLDING COMPANY ACT OF 1956.

Acquisition of out-of-state bank—Validity of state statutes.—Under § 3(d) of Act, which prohibits Federal Reserve Board from approving an application of a bank holding company located in one State to acquire a bank located in another State unless acquisition is specifically authorized by statute of latter State, Connecticut and Massachusetts statutes—providing that an out-of-state bank holding company with its principal place of business in another New England State may acquire an in-state bank if other State accords reciprocal privileges to enacting State's banking organizations—are of type contemplated to lift Act's ban on interstate acquisitions, and do not violate Commerce Clause, Compact Clause, or Equal Protection Clause. Northeast Bancorp, Inc. v. Board of Governors, FRS, p. 159.

BOYCOTTS. See **Antitrust Acts**, 2.

BROKERS. See **Securities Regulation**, 1.

CABINET OFFICERS' IMMUNITY FROM SUIT. See **Constitutional Law**, VII, 2; **Jurisdiction**, 1.

CAPITAL PUNISHMENT. See **Constitutional Law**, I.

CIVIL SERVICE REFORM ACT OF 1978.

Government employee—Disciplinary action by agency—Arbitration.—Under Act's provision stating that a federal agency's disciplinary action against an employee may not be sustained by Merit Systems Protection Board if employee shows "harmful error" in agency's application of its disciplinary procedures, which provision is made applicable to an arbitrator if employee chooses alternative of challenging disciplinary action under grievance and arbitration provisions of a collective-bargaining agreement between agency and employee's union, an employee challenging disciplinary action by means of collective-bargaining arbitration must show error causing substantial prejudice to his individual rights, not just a violation of bargaining agreement that is harmful only to union. Cornelius v. Nutt, p. 648.

CLASS ACTIONS. See **Constitutional Law, II, 2; Standing.**

COLLATERAL ORDERS. See **Jurisdiction.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Civil Service Reform Act of 1978.**

COMMERCE CLAUSE. See **Bank Holding Company Act of 1956.**

COMPACT CLAUSE. See **Bank Holding Company Act of 1956.**

CONNECTICUT. See **Constitutional Law, IV, 2; Bank Holding Company Act of 1956.**

CONSTITUTIONAL LAW. See also **Aliens; Bank Holding Company Act of 1956; Investment Advisers Act of 1940.**

I. Cruel and Unusual Punishment.

1. *Death penalty—Appellate review of jury's determination—Prosecutor's improper argument.*—It is impermissible under Eighth Amendment to rest a death sentence on a determination by a sentencer who has been led to believe that responsibility for determining appropriateness of defendant's death rests elsewhere, such as when prosecutor, during argument to jury at sentencing stage of petitioner's state-court murder trial, urged jury not to view itself as finally determining whether petitioner should die, because death sentence would be reviewed for correctness by Mississippi Supreme Court; this Court did not lack jurisdiction to decide issue, since there was no indication that decision below rested on adequate and independent state grounds. Caldwell v. Mississippi, p. 320.

2. *Death penalty—Validity of state statute.*—Where petitioner was convicted of a capital offense and sentenced to death under an Alabama statute—which required jury that convicted a defendant of any specified aggravated crime to fix punishment at death, but which further provided that notwithstanding jury's "sentence," trial court, after weighing aggra-

CONSTITUTIONAL LAW—Continued.

vating and mitigating circumstances presented at required sentencing hearing, could refuse to accept death penalty and, instead, could impose a life sentence—requirement that jury return a death "sentence" along with its guilty verdict did not render unconstitutional petitioner's death sentence, which trial court imposed after independently considering his background and character and circumstances of crime. Baldwin v. Alabama, p. 372.

II. Due Process.

1. *Food-stamp benefits—Change in law—Validity of state notice to recipients.*—Where, after Congress amended Food Stamp Act to reduce earned-income disregard used in computing eligibility for food stamps, Massachusetts Department of Public Welfare's notice to all food-stamp recipients in State with earned income—advising them that reduction in earned-income disregard might result in either a reduction or termination of their benefits, that they had a right to request a hearing, and that their benefits would be reinstated if a hearing was requested within 10 days of notice—complied with statute and regulations, and did not violate Due Process Clause. Atkins v. Parker, p. 115.

2. *Nationwide class action—State court's jurisdiction—Applicable state law.*—Where (1) respondents, royalty owners possessing rights to leases from which petitioner produced gas, brought class action against petitioner in a Kansas state court, seeking to recover interest on petitioner's delayed royalty payments, (2) court certified nationwide class, members of which received notification of action and of right to "opt out" of class, (3) final class consisted of about 28,000 royalty owners, some 97% of which had no connection to Kansas except for lawsuit, and over 99% of gas leases similarly had no other Kansas connection, and (4) court applied Kansas law to every claim and found petitioner liable to all class members, court did not violate Due Process Clause (which does not require that absent class members "opt in" to class rather than "opt out") in asserting personal jurisdiction over absent class members and their claims, but application of Kansas law to claims that were unrelated to Kansas was so arbitrary and unfair as to exceed constitutional limits. Phillips Petroleum Co. v. Shutts, p. 797.

3. *Prisoners' good time credits—Revocation—Evidence.*—Assuming that a prisoner's good time credits constitute a protected liberty interest, revocation of such credits by prison administration must be supported by some evidence in order to satisfy minimum due process requirements; requirements were met where a prison disciplinary board, in proceedings resulting in revocation of respondent prisoners' good time credits, heard a prison guard's testimony, and received his written report, stating that he heard a commotion in a prison walkway, discovered an inmate who evidently had just been assaulted, and saw three other inmates, including respondents,

CONSTITUTIONAL LAW—Continued.

fleeing down walkway. Superintendent, Mass. Correctional Institution at Walpole v. Hill, p. 445.

III. Equal Protection of the Laws.

1. *Automobile use tax—Validity of state statute.*—On its face, a Vermont statute that imposed a use tax when cars were registered with Vermont, but not if car was purchased in Vermont and a sales tax was paid, and that also provided for reduction of use tax by amount of any sales or use tax paid to another State if that State afforded a credit for taxes paid to Vermont in similar circumstances, but only if registrant was a Vermont resident at time he paid other State's taxes, violated Equal Protection Clause. Williams v. Vermont, p. 14.

2. *Tax exemption for Vietnam War veterans—State residence requirement.*—Equal Protection Clause was violated by residence requirement of a New Mexico statute exempting from State's property tax $2,000 of taxable value of property of honorably discharged veterans who served on active duty during Vietnam War for at least 90 continuous days and who were New Mexico residents before May 8, 1976. Hooper v. Bernalillo County Assessor, p. 612.

IV. Freedom of Religion.

1. *Public schools—Minute of silence—Validity of state statute.*—An Alabama statute that authorized a 1-minute period of silence in all public schools "for meditation or voluntary prayer" was a law respecting establishment of religion and thus violated First Amendment. Wallace v. Jaffree, p. 38.

2. *Working on Sabbath—Validity of state statute.*—A Connecticut statute providing that no person who states that a particular day of week is his Sabbath may be required by his employer to work on such day, and that employee's refusal to work on his Sabbath shall not constitute grounds for his dismissal, violated Establishment Clause by providing Sabbath observers with an absolute and unqualified right not to work on their chosen Sabbath. Estate of Thornton v. Caldor, Inc., p. 703.

V. Freedom of Speech.

1. *Defamation by credit reporting agency—Showing of "actual malice."*—A State Supreme Court's judgment was affirmed where (1) respondent brought a defamation action against petitioner credit reporting agency for false statements in petitioner's report to certain of its subscribers as to respondent's financial condition, (2) jury returned a verdict in respondent's favor, (3) trial court granted a new trial on ground that it had improperly instructed jury so as to permit a damages award on a lesser showing than "actual malice," court believing that "actual malice" showing was necessary under First Amendment principles, and (4) State Supreme Court

CONSTITUTIONAL LAW—Continued.
reversed on ground that such principles applied only to news media defendants. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., p. 749.

2. *Military bases—Open houses for public.*—Where (1) in 1972, respondent received from a commanding officer a letter forbidding him to reenter a military base without written permission, such letter having been issued after respondent had entered base and destroyed Government property, and (2) in 1981, respondent entered base during its Armed Forces Day open house for public, 18 U. S. C. § 1382, which prohibits a person from reentering a military base after having been ordered not to reenter by commanding officer, applied to respondent's conduct, and First Amendment did not bar his conviction for violating § 1382. United States v. Albertini, p. 675.

3. *Obscenity—Validity of state statute.*—In an action challenging validity, on First Amendment grounds, of a Montana statute which declared to be a moral nuisance any place where lewd films or publications were publicly exhibited or sold, Court of Appeals erred in facially invalidating statute in its entirety on ground that statute's definition of "prurient" as including "lust" was unconstitutionally overbroad in that it reached constitutionally protected material that merely stimulated normal sexual responses; absent countervailing considerations, statute should have been invalidated only insofar as word "lust" was to be understood as reaching protected materials. Brockett v. Spokane Arcades, Inc., p. 491.

VI. Right to Petition Government.

Libel—Petitions to Government officials.—Petition Clause of First Amendment does not provide absolute immunity to defendants charged with expressing libelous and damaging falsehoods in petitions to Government officials; lower courts in respondent's libel action against petitioner properly held that Clause did not grant absolute immunity to petitioner, who allegedly wrote letters to President (and sent copies to other Government officials) knowing that statements concerning respondent were false, and maliciously intending to undermine respondent's prospect of being appointed as a United States Attorney. McDonald v. Smith, p. 479.

VII. Searches and Seizures.

1. *Adult bookstore—Undercover officer's purchase of obscene magazines.*—Where (1) an undercover officer purchased magazines from respondent salesclerk at an adult bookstore, using a marked bill, (2) officer showed magazines to fellow officers waiting nearby, and, upon concluding that magazines were obscene, officers returned to store, arrested respondent, and retrieved bill (neglecting to return change received at time of purchase), and (3) magazines were admitted in evidence at trial that resulted in respondent's conviction for violating state obscenity statute, officers did not obtain possession of magazines by means of an unreasonable search or

CONSTITUTIONAL LAW—Continued.
seizure, and magazines were not fruit of an arrest, lawful or otherwise. Maryland v. Macon, p. 463.

2. *Illegal wiretaps—Attorney General's immunity from suit.*—Where (1) petitioner, as Attorney General, authorized a warrantless wiretap to gather intelligence regarding a group that was planning actions threatening national security, (2) Government intercepted conversations between a member of group and respondent, (3) this Court, in another case, held that Fourth Amendment does not permit warrantless wiretaps in cases involving domestic threats to national security, and (4) respondent then filed a damages action against petitioner, alleging that surveillance here violated Fourth Amendment and Omnibus Crime Control and Safe Streets Act, petitioner was not absolutely immune from suit but was entitled to qualified immunity notwithstanding his actions violated Fourth Amendment. Mitchell v. Forsyth, p. 511.

COOPERATIVES. See **Antitrust Acts**, 2.

CORPORATE INSIDERS. See **Securities Regulation**, 1.

COURTS OF APPEALS. See **Jurisdiction.**

CREDIT REPORTING AGENCY'S LIABILITY FOR DEFAMATION. See **Constitutional Law**, V, 1.

CRIMINAL JUSTICE ACT. See **Attorneys.**

CRIMINAL LAW. See **Constitutional Law**, I; II, 3; V, 2; VII, 1.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law**, I.

DEATH PENALTY. See **Constitutional Law**, I.

DEFAMATION. See **Constitutional Law**, V, 1; VI.

DISCIPLINARY PROCEEDINGS AGAINST PRISONERS. See **Constitutional Law**, II, 3.

DISCIPLINING ATTORNEYS. See **Attorneys.**

DISCRIMINATION BASED ON AGE. See **Age Discrimination in Employment Act of 1967.**

DISCRIMINATION BASED ON NATIONAL ORIGIN. See **Aliens.**

DISCRIMINATION BASED ON RACE. See **Aliens.**

DISCRIMINATION BASED ON RESIDENCY. See **Constitutional Law**, III.

DISQUALIFICATION OF ATTORNEYS. See **Jurisdiction**, 2.

DUE PROCESS. See **Constitutional Law**, II.

EARNED-INCOME DISREGARD FOR FOOD-STAMP ELIGIBILITY. See **Constitutional Law**, II, 1.

EASEMENTS. See **Pueblo Lands Act of 1924.**

EIGHTH AMENDMENT. See **Constitutional Law**, I.

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.

Multiemployer benefit plans for employees—Employer liability—Audits of employer records.—Where (1) petitioners, multiemployer benefit plans governed by Act, operated under trust agreements for purpose of providing health, welfare, and pension benefits to employees performing work covered by collective-bargaining agreements that required respondent employers, who agreed to be bound by trust agreements, to make contributions to petitioners for each such employee, (2) petitioners relied on employers' self-reporting to determine their liability for contributions and policed employers by random audits of their records, and (3) when respondents refused to allow a requested audit, petitioners filed suit in District Court for an order permitting audit, respondents were required to allow audit since it was supported by trust agreements' provisions and was reasonable in light of Act's standards and policies. Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., p. 559.

EMPLOYER AND EMPLOYEES. See **Age Discrimination in Employment Act of 1967; Civil Service Reform Act of 1978; Constitutional Law**, IV, 2; **Employee Retirement Income Security Act of 1974.**

EQUAL PROTECTION OF THE LAWS. See **Aliens; Bank Holding Company Act of 1956; Constitutional Law**, III.

ESTABLISHMENT OF RELIGION. See **Constitutional Law**, IV.

EVIDENCE. See **Constitutional Law**, II, 3.

FEDERAL INCOME TAXES. See **Internal Revenue Code.**

FEDERAL RULES OF APPELLATE PROCEDURE. See **Attorneys.**

FEDERAL-STATE RELATIONS. See **Bank Holding Company Act of 1956; Internal Revenue Code; Pueblo Lands Act of 1924.**

FIFTH AMENDMENT. See **Aliens.**

FINAL JUDGMENTS. See **Jurisdiction.**

FIREFIGHTERS. See **Age Discrimination in Employment Act of 1967**, 2.

FIRST AMENDMENT. See **Constitutional Law**, IV–VI; VII, 1; **Investment Advisers Act of 1940.**

FLIGHT ENGINEERS. See **Age Discrimination in Employment Act of 1967, 1.**

FOOD STAMP ACT. See **Constitutional Law, II, 1.**

FOURTEENTH AMENDMENT. See **Constitutional Law, II; III; IV, 1.**

FOURTH AMENDMENT. See **Constitutional Law, VII; Jurisdiction, 1.**

FRAUD. See **Securities Regulation.**

FREEDOM OF RELIGION. See **Constitutional Law, IV.**

FREEDOM OF SPEECH. See **Constitutional Law, V; VII, 1.**

FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law, II, 2.**

GAS LEASES. See **Constitutional Law, II, 2; Standing.**

GOOD TIME CREDITS OF PRISONERS. See **Constitutional Law, II, 3.**

GOVERNMENT EMPLOYEES. See **Age Discrimination in Employment Act of 1967, 2; Civil Service Reform Act of 1978.**

GROUP BOYCOTTS. See **Antitrust Acts, 2.**

HEALTH BENEFITS FOR EMPLOYEES. See **Employee Retirement Income Security Act of 1974.**

HOLDING COMPANY'S ACQUISITION OF BANK. See **Bank Holding Company Act of 1956.**

IMMIGRATION AND NATURALIZATION SERVICE RULES. See **Aliens.**

IMMUNITY FROM LIABILITY FOR LIBEL IN PETITION TO GOVERNMENT OFFICIAL. See **Constitutional Law, VI.**

IMMUNITY OF CABINET OFFICERS FROM SUIT. See **Constitutional Law, VII, 2; Jurisdiction, 1.**

INCOME TAXES. See **Internal Revenue Code.**

INDIANS. See **Pueblo Lands Act of 1924.**

INSIDE INFORMATION. See **Securities Regulation, 1.**

INSTRUCTIONS TO JURY. See **Age Discrimination in Employment Act of 1967, 1.**

INTERNAL REVENUE CODE.

Delinquent income taxes—Levy on joint bank accounts.—Under §§ 6331(a) and 6332(a) of Code, Internal Revenue Service had a right to levy on joint bank accounts in respondent bank in Arkansas for delin-

INTERNAL REVENUE CODE—Continued.

quent income taxes owed by only one of codepositors, notwithstanding under Arkansas garnishment law a bank depositor's creditor was not subrogated to depositor's power to withdraw account and, in a garnishment proceeding, creditor would have to join codepositors. United States v. National Bank of Commerce, p. 713.

INTERSTATE ACQUISITIONS OF BANKS BY HOLDING COMPANIES. See **Bank Holding Company Act of 1956.**

INVESTMENT ADVISERS ACT OF 1940.

Revocation of adviser's registration—Publication of newsletters.—Where a corporation's registration as an investment adviser under Act was revoked because of its president's convictions of various offenses involving investments, and corporation and its president (with other unregistered corporations) thereafter published on a regular basis, for paid subscribers, newsletters containing impersonal investment advice and commentary, such publications fell within statutory exclusion of bona fide publications, and neither corporation nor its president was an "investment adviser" as defined in Act so as to justify restraining future publications. Lowe v. SEC, p. 181.

JOINT BANK ACCOUNTS AS SUBJECT TO TAX LEVY. See **Internal Revenue Code.**

JURISDICTION. See also **Constitutional Law,** I, 1; II, 2; **Standing.**

1. *Court of Appeals—"Final decision"—Attorney General's liability for wiretap.*—Where (1) respondent filed a damages action against petitioner, who, as Attorney General, authorized a warrantless wiretap to gather intelligence regarding a group that was planning actions threatening national security, resulting in interception of conversations between a group member and respondent, and (2) respondent alleged that surveillance violated Fourth Amendment and Omnibus Crime Control and Safe Streets Act, District Court's order granting summary judgment for respondent on liability issue and holding that petitioner was not entitled to either absolute or qualified immunity from suit, to extent that such order turned on a question of law, was a "final decision" appealable to Court of Appeals within meaning of 28 U. S. C. § 1291 notwithstanding absence of a final judgment. Mitchell v. Forsyth, p. 511.

2. *Court of Appeals—"Final" judgments—Order disqualifying counsel.*—An order disqualifying counsel in a civil case is not a collateral order subject to immediate appeal as a "final" judgment within meaning of 28 U. S. C. § 1291, and hence Court of Appeals lacked jurisdiction of appeal by a child, who was born with physical defects allegedly caused by drugs manufactured by petitioner and taken by mother during pregnancy, from

JURISDICTION—Continued.
District Court's pretrial order, in child's civil action against petitioner, disqualifying law firm that represented child and revoking appearances of two of its attorneys because of misconduct. Richardson-Merrell Inc. v. Koller, p. 424.

JURY INSTRUCTIONS. See **Age Discrimination in Employment Act of 1967, 1.**

LIBEL BY CREDIT REPORTING AGENCY. See **Constitutional Law, V, 1.**

LIBEL IN PETITION TO GOVERNMENT OFFICIAL. See **Constitutional Law, VI.**

MANDATORY DEATH SENTENCES. See **Constitutional Law, I, 2.**

MANDATORY RETIREMENT. See **Age Discrimination in Employment Act of 1967.**

"MANIPULATIVE" ACTS CONCERNING TENDER OFFERS. See **Securities Regulation, 2.**

MASSACHUSETTS. See **Bank Holding Company Act of 1956.**

MILITARY BASE OPEN HOUSE FOR PUBLIC. See **Constitutional Law, V, 2.**

MINUTE OF SILENCE IN PUBLIC SCHOOLS. See **Constitutional Law, IV, 1.**

MISCONDUCT OF ATTORNEYS. See **Attorneys; Jurisdiction, 2.**

MISREPRESENTATIONS CONCERNING TENDER OFFERS. See **Securities Regulation, 2.**

MONOPOLIZATION OF SKIING FACILITIES. See **Antitrust Acts, 1.**

MONTANA. See **Constitutional Law, V, 3.**

MULTIEMPLOYER BENEFIT PLANS FOR EMPLOYEES. See **Employee Retirement Income Security Act of 1974.**

NATIONAL SECURITY WIRETAPS. See **Constitutional Law, VII, 2; Jurisdiction, 1.**

NATIONWIDE CLASS ACTIONS. See **Constitutional Law, II, 2; Standing.**

NEW MEXICO. See **Constitutional Law, III, 2; Pueblo Lands Act of 1924.**

NEWSLETTERS CONTAINING INVESTMENT ADVICE. See **Investment Advisers Act of 1940.**

NONDISCLOSURE CONCERNING TENDER OFFERS. See **Securities Regulation, 2.**

NONINTERCOURSE ACT. See **Pueblo Lands Act of 1924.**

OBSCENITY. See **Constitutional Law, V, 3; VII, 1.**

OFFICE SUPPLY RETAILERS. See **Antitrust Acts, 2.**

OMNIBUS CRIME CONTROL AND SAFE STREETS ACT. See **Constitutional Law, VII, 2; Jurisdiction, 1.**

OPEN HOUSE FOR PUBLIC AT MILITARY BASE. See **Constitutional Law, V, 2.**

PAROLE FROM DETENTION OF ALIENS SEEKING ADMISSION. See **Aliens.**

PILOTS. See **Age Discrimination in Employment Act of 1967, 1.**

POLICE OFFICER'S PURCHASE OF OBSCENE MAGAZINES. See **Constitutional Law, VII, 1.**

PRAYER IN PUBLIC SCHOOLS. See **Constitutional Law, IV, 1.**

PRISONERS' GOOD TIME CREDITS. See **Constitutional Law, II, 3.**

PROPERTY TAXES. See **Constitutional Law, III, 2.**

PROSECUTOR'S IMPROPER ARGUMENT AS TO DEATH PENALTY. See **Constitutional Law, I, 1.**

PUBLIC EMPLOYEES. See **Age Discrimination in Employment Act of 1967, 2; Civil Service Reform Act of 1978.**

PUBLIC SCHOOL PRAYER. See **Constitutional Law, IV, 1.**

PUEBLO LANDS ACT OF 1924.

Pueblo's grant of easement—Validity.—A 1928 agreement, approved by Secretary of Interior, between petitioner company and respondent pueblo whereby petitioner was granted a telephone-line easement on pueblo's land in New Mexico was valid under § 17 of Act even though Congress had not enacted legislation approving conveyance. Mountain States Telephone & Telegraph Co. v. Santa Ana Pueblo, p. 237.

RACIAL DISCRIMINATION. See **Aliens.**

RELIGIOUS FREEDOM. See **Constitutional Law, IV.**

RESIDENCE REQUIREMENTS FOR TAX EXEMPTIONS. See **Constitutional Law, III, 2.**

RETIREMENT PLANS. See **Age Discrimination in Employment Act of 1967; Employee Retirement Income Security Act of 1974.**

REVOCATION OF PRISONERS' GOOD TIME CREDITS. See **Constitutional Law**, II, 3.

RIGHT TO PETITION GOVERNMENT. See **Constitutional Law**, VI.

ROBINSON-PATMAN ACT. See **Antitrust Acts**, 2.

ROYALTY PAYMENTS UNDER GAS LEASES. See **Constitutional Law**, II, 2; **Standing.**

SABBATH AS WORKDAY. See **Constitutional Law**, IV, 2.

SCHOOL PRAYER. See **Constitutional Law**, IV, 1.

SEARCHES AND SEIZURES. See **Constitutional Law**, VII; **Jurisdiction**, 1.

SECURITIES EXCHANGE ACT OF 1934. See **Securities Regulation.**

SECURITIES REGULATION. See also **Investment Advisers Act of 1940.**

1. *Fraud—Inside information—Tippee as* in pari delicto.—Where (1) respondent investors filed a federal-court damages action alleging that they incurred trading losses after a securities broker (employed by petitioner) and a corporation's officer fraudulently induced them to purchase corporation's stock by divulging false information about corporation on pretext that it was accurate inside information, and that such alleged scheme violated antifraud provisions of Securities Exchange Act of 1934 and implementing regulation, and (2) District Court dismissed complaint on ground that respondents were *in pari delicto* with broker and corporate insider and thus were barred from recovery, there was no basis at such stage of litigation for applying *in pari delicto* defense to bar respondents' action. Bateman Eichler, Hill Richards, Inc. v. Berner, p. 299.

2. *Tender offers—"Manipulative" acts.*—"Manipulative" acts under § 14(e) of Securities Exchange Act of 1934 require misrepresentation or nondisclosure, and thus statute was not violated where (1) a corporation made a hostile tender offer for another company to which a majority of latter's shareholders subscribed, (2) offering corporation, after negotiations with target company, rescinded original tender offer and substituted a new offer, causing diminished payments to those shareholders who had tendered their shares during first offer and then retendered under second offer, and (3) in class action against both companies and members of target's board of directors, it was alleged that their acts constituted a "manipulative" distortion of market for target's stock. Schreiber v. Burlington Northern, Inc., p. 1.

SHERMAN ACT. See **Antitrust Acts.**

SILENT PRAYER IN PUBLIC SCHOOLS. See **Constitutional Law**, IV, 1.

SKIING FACILITIES. See **Antitrust Acts**, 1.

STANDING.

Nationwide class action—State-court jurisdiction over nonresidents.—In a class action in a Kansas state court brought against petitioner by respondents, royalty owners who possessed rights to leases from which petitioner produced gas and who sought to recover interest on petitioner's delayed royalty payments, wherein court certified a nationwide class of royalty owners, petitioner had standing to assert claim that Kansas did not have jurisdiction over class members who were not Kansas residents and had no connection to Kansas. Phillips Petroleum Co. v. Shutts, p. 797.

STATE PROPERTY TAXES. See **Constitutional Law**, III, 2.

STATE USE TAXES ON AUTOMOBILES. See **Constitutional Law**, III, 1.

STOCKBROKERS. See **Securities Regulation**, 1.

SUPREME COURT. See also **Constitutional Law**, I, 1.

1. Appointment of Joseph F. Spaniol, Jr., as Clerk, p. 1013.
2. Appointment of Stephen G. Margeton as Librarian, p. 1013.

SUSPENSION OF ATTORNEY FROM PRACTICE. See **Attorneys.**

TAXES. See **Constitutional Law**, III; **Internal Revenue Code.**

TELEPHONE-LINE EASEMENTS. See **Pueblo Lands Act of 1924.**

TENDER OFFERS. See **Securities Regulation**, 2.

USE TAXES ON AUTOMOBILES. See **Constitutional Law**, III, 1.

VERMONT. See **Constitutional Law**, III, 1.

VIETNAM WAR VETERANS' TAX EXEMPTION. See **Constitutional Law**, III, 2.

WELFARE BENEFITS. See **Constitutional Law**, II, 1; **Employee Retirement Income Security Act of 1974.**

WHOLESALE PURCHASING COOPERATIVES. See **Antitrust Acts**, 2.

WILLIAMS ACT. See **Securities Regulation**, 2.

WIRETAPS. See **Constitutional Law**, VII, 2; **Jurisdiction**, 1.

WORDS AND PHRASES.

1. *"Bona fide occupational qualification."* § 4(f)(1), Age Discrimination in Employment Act of 1967, 29 U. S. C. § 623(f)(1). Johnson v. Mayor & City Council of Baltimore, p. 353; Western Air Lines, Inc. v. Criswell, p. 400.

WORDS AND PHRASES—Continued.

2. *"Final decisions."* 28 U. S. C. § 1291. Richardson-Merrell Inc. v. Koller, p. 424; Mitchell v. Forsyth, p. 511.

3. *"Harmful error."* Civil Service Reform Act of 1978, 5 U. S. C. § 7701(c)(2)(A). Cornelius v. Nutt, p. 648.

4. *"Investment adviser."* § 202(a)(11)(D), Investment Advisers Act of 1940, 15 U. S. C. § 80b–2(a)(11)(D). Lowe v. SEC, p. 181.

5. *"Manipulative" acts.* § 14(e), Securities Exchange Act of 1934, 15 U. S. C. § 78n(e). Schreiber v. Burlington Northern, Inc., p. 1.